SQUIRE PATTON BOGGS

OSHA and EEOC Expand Guidance to Employers Regarding COVID-19

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The Occupational Safety and Health Administration (OSHA) and U.S. Equal Employment Opportunity Commission (EEOC) recently published guidance clarifying several employment issues related to COVID-19.

In particular, OSHA published a COVID-19 FAQ, and the EEOC supplemented its Technical Assistance Q&A regarding COVID-19 and federal equal employment opportunity laws. Here is what employers need to know as they prepare to reopen their workplaces:

1. Employers that require employees to wear cloth face coverings in the workplace do not need to provide their employees with the face coverings or ensure their adequacy.

OSHA regulations impose certain requirements on employers whose employees need to wear personal protective equipment (PPE) while working. First, such employers must provide their employees with PPE and maintain it "in a sanitary and reliable condition." Second, if employees use their own PPE, their employer must "assure its adequacy, including proper maintenance, and sanitation of such equipment."

OSHA's recently published FAQ, however, clarified that cloth face coverings are not PPE. While cloth face coverings are an effective means of "source control"—i.e., they "prevent wearers who have Coronavirus Disease 2019 (COVID-19) without knowing it (i.e., those who are asymptomatic or pre-symptomatic) from spreading potentially infectious respiratory droplets to others"—they do "not protect the wearer against airborne transmissible infectious agents." Therefore, cloth face coverings are not subject to OSHA's PPE standards, and employers who require employees to wear cloth face coverings at work do not have to provide the face coverings to their employees or ensure that their employees' face coverings are adequate.

2. Employers may invite employees to request reasonable accommodations related to COVID-19 before reopening the workplace.

In preparation to reopen their workplaces, employers may provide their employees with information regarding reasonable accommodations related to COVID-19 without running afoul of the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), or Rehabilitation Act.

This may take the form of a general notice that the employer will consider requests for accommodations on an individualized basis. Or employers may provide more detailed information, such as: (1) the CDC's list of medical conditions that may place people at higher risk of serious illness if they contract COVID-19; (2) an explanation that the employer will consider any requests on a case-by-case basis by employees who have these or other medical conditions; and (3) instructions for requesting an accommodation they may need upon returning to the workplace, including whom to contact.

As always, the contacts for such requests should know how to handle the requests consistent with applicable law. Employers may then engage in the interactive process with any employees who request reasonable accommodations before returning to work.

3. Requests for alternative methods of health screening because of a disability or religious belief are requests for reasonable accommodations.

Many employers are implementing temperature checks and other screenings prior to employees being permitted into their worksite. If an employee requests an alternative method of workplace health screening due to a medical condition or religious belief, this is a request for reasonable accommodation, and the employer should treat it the same as any other request for accommodation under the ADA or Rehabilitation Act (if based on disability) or Title VII of the Civil Rights Act (if based on religion). If an alternative screening method is easy and inexpensive to provide, an employer may forgo the interactive process by voluntarily making the accommodation available to anyone who requests it.

4. Employees without disabilities are not entitled to accommodations because of a family member's disabilities.

The ADA prohibits disparate treatment or harassment of an employee based on the employee's association with an individual with a disability. But "[t]he ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated." Thus, employees without disabilities are not entitled to reasonable accommodations (such as teleworking arrangements) to avoid exposing a high-risk family member with an underlying medical condition to COVID-19.

5. Employers may not involuntarily exclude older or pregnant employees from the workplace merely because their age or pregnancy places them at heightened risk of COVID-19, but these employees may be entitled to reasonable accommodations on other bases.

The ADEA protects individuals age 40 and older from age-based employment discrimination. So while the CDC has explained that individuals age 65 and over are at higher risk of a severe case of COVID-19, the ADEA prohibits covered employers from involuntarily excluding individuals from the workplace merely because they fall into that vulnerable age group. The same is true for pregnant employees, who are protected from discrimination under Title VII. Even if motivated by benevolent concern, an employer may not single out employees on the basis of age, pregnancy, or another protected status for exclusion from the workplace.

That said, while neither the ADEA nor Title VII requires reasonable accommodations for older or pregnant employees, it may be appropriate to engage in the interactive process with them. The ADEA permits employers to provide flexibility to workers age 65 and older, even if it results in comparatively less favorable treatment of younger workers based on age. Further, both employees age 65 and older and pregnant employees may have medical conditions that qualify as "disabilities" under the ADA and therefore entitle the employees to reasonable accommodations. Although pregnancy itself is not a disability, pregnancy-related medical conditions may be. Therefore, these employees may request reasonable accommodations—and their employer must engage in the interactive process and offer reasonable accommodations, if any—based on their disabilities, not their age or pregnancy.

It is worth noting that employers may offer their employees any accommodations as long as they do not treat employees differently based on a protected characteristic. So, for example, a pregnant employee may be entitled to telework, changes to work schedules or assignments, or leave to the extent those accommodations are provided to other employees who are similar in their ability or inability to work. Further, if an employer offers accommodations to employees with school-age children due to school closures, male employees must receive the accommodations on the same terms as female employees, as it would be discriminatory to treat female employees more favorably based on the assumption that they are responsible for childcare.

6. Employers must be vigilant for harassment by teleworking employees and address it the same as if the employees were engaging in the same conduct in the workplace.

Employees may engage in harassing conduct not only in person but also remotely by, for example, email, telephone, videoconference, text message, and instant-messaging platforms. Thus, harassment may occur regardless of whether employees are in the workplace, teleworking, or on leave.

Employers should ensure their supervisory employees are watching for demeaning, derogatory, or hostile remarks directed toward employees based on their protected characteristics. Such harassment may be directed toward those who are (or are perceived to be) of Chinese or other Asian national origin, and may include comments about COVID-19 or its origins. If an employer learns that a teleworking employee is sending harassing messages to another worker, or engaging in other harassing conduct, the employer should take the same steps it would take if the harassing employee were engaging in the same conduct in the workplace.

Now is an opportune time for employers to remind their workforces about Title VII's prohibitions on harassment, and to clarify that unlawful harassment may occur away from the workplace, particularly as many continue to telework. In so reminding employees, employers may reaffirm their zero-tolerance policy for harassment and the disciplinary consequences of violations, and encourage anyone who experiences or witnesses harassment to report it to management.

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