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***EFFECTIVELY ACCOMMODATING
DISABILITIES AS EMPLOYEES RETURN
TO WORK***



WORKPLACE GUIDANCE WEBINAR SERIES

Presented By:
Reminger Co., LPA
Employment Practices
Group



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DISCLAIMER

These materials were prepared by the law firm of Reminger Co. LPA for attendees' reference during this seminar. This presentation, these materials, and related discussions are informational and educational in nature and are not intended to provide legal advice for any specific situation. Professional advice should be obtained before attempting to address any particular legal situation or problem. Furthermore, because requirements at the federal, state, and local levels are continually changing during this COVID-19 pandemic and some rules/regulations are industry-specific, please consult counsel prior to relying on the information contained herein.

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TODAY'S AGENDA

1. Navigating the Interactive Process for Accommodation Requests in the Current Environment of COVID
2. What to Consider When Evaluating Whether an Employee's Request for Accommodation Presents an "Undue Hardship"
3. Factors to Consider When Determining Whether an Employee's Condition Presents a "Direct Threat" to the Workplace
4. How to Safeguard Your Workplace from Pandemic-Related Harassment
5. Special Rules to Keep in Mind with Respect to Waiver of Potential ADA Claims When Conducting Layoffs and Furloughs

Navigating the Interactive Process for Accommodation Requests in the Current Environment of COVID

- The Americans with Disabilities Act, which protects applicants and employees from disability discrimination, is relevant to the current Coronavirus pandemic in at least three significant ways:
 1. The ADA regulates employers' disability-related inquiries and medical examinations for **all** applicants and employees (including those who do not have ADA disabilities).
 2. The ADA prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons **unless** they pose a "direct threat."
 3. The ADA requires reasonable accommodations for **individuals with disabilities** (absent undue hardship) during the Coronavirus pandemic. (Note: The ADA does *not* require employers to accommodate employees who have high-risk family members)
- The Interactive Process: The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
 - Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief that the employee's ability to perform essential job functions will be impaired by a medical condition or the employee poses a direct threat due to a medical condition.
 - During a pandemic, employers **may** ask employees if they are experiencing symptoms of the Coronavirus.
- As a reminder, the EEOC defines a "reasonable accommodation" as "a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment."

Navigating the Interactive Process for Accommodation Requests in the Current Environment of COVID

- Since the ADA generally requires employers to provide reasonable accommodations for applicants and employees with disabilities, how does that duty change during a pandemic, if at all?
- Must an employer accommodate an employee with a disability during the Coronavirus pandemic simply because their condition places them at greater risk from COVID-19?
 - Yes, provided the accommodation is reasonable and does not result in an “undue hardship.”
 - If the requested accommodation imposes an “undue hardship,” the employer does not have to provide it but, remember, the employer must still engage the employee in the “interactive process” to see whether other accommodations can be made that do not impose such a hardship.
- Must an employer permit an employee infected with COVID to stay at work with an accommodation?
 - No. Current CDC guidelines state that employers should send home employees who exhibit symptoms or test positive for COVID, then employee should follow CDC guidelines for isolation, etc. (How about infected family members?)
- So, given the current climate, what accommodations are “reasonable”?
 - For jobs that can be done remotely, telecommuting.
 - For jobs that *must* be performed at the workplace, the EEOC suggests first considering low-cost options that can be easily implemented or involve materials on-hand (*e.g.*, designating one-way aisles, spacing out workspaces, using existing barriers to ensure a minimum proximity between employees/customers, and limiting interactions between employees where feasible.
- For the interactive process, flexibility is key. Temporary modifications to job responsibilities, temporary transfers, and temporary modifications to work schedule to allow less exposure to others in the workplace could all be considered viable options under the circumstances.

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Navigating the Interactive Process for Accommodation Requests in the Current Environment of COVID

- Suppose an employee was already receiving a reasonable accommodation before the Coronavirus pandemic, can they still be entitled to an altered or additional accommodation due to COVID?
 - Yes, absent an “undue hardship.” The interactive process requires continued communication between the employee and employer. If an employee’s pre-existing disability is now more at risk because of COVID, additional accommodations could be necessary.
- Remember, though, the ADA permits employers to request medical documentation to determine whether an employee’s disability requires accommodation in the first place.
 - During the Coronavirus pandemic, this is unchanged and employers may also request medical documentation from an employee’s health care provider to explain why additional accommodations are necessary.
- A common question arises concerning whether an employee may request an accommodation in order to avoid exposing a high-risk family member or members to COVID.
 - The ADA does not require an employer to provide a reasonable accommodation under those circumstances, although it may choose to do so.
 - However, the FMLA may provide for leave for that employee to take care of an infected family member.
- Employers can “invite” employees to request flexible schedules/workplaces.

What to Consider When Evaluating Whether an Employee's Request for Accommodation Presents an "Undue Hardship"

- An accommodation poses an "undue hardship" if it results in ***significant difficulty*** or ***expense*** for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.
- The circumstances surrounding the pandemic itself may be considered when determining whether an accommodation request poses an "undue hardship."
 - The EEOC has stated that an accommodation that did not pose an undue hardship pre-pandemic may nevertheless present an undue hardship during the pandemic depending on the circumstances.
- "Significant difficulty" vs. "Significant expense"
 - An employer may consider the facts of the particular job and workplace, including those unique circumstances of a pandemic, when determining whether a request presents a "significant difficulty" or "significant expense."
 - A diminished workforce, inability to conduct a needs assessment, and/or trouble finding temporary employees may contribute to a request constituting a "significant difficulty."
 - Sudden loss of income stream, sharp downturn in revenue, and/or disrupted supply chain for PPE and other supplies can all contribute to a request constituting an unusually "significant expense."

Factors to Consider When Determining Whether an Employee's Condition Presents a "Direct Threat" to the Workplace

- According to the EEOC, a "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
- If an individual with a disability poses a "direct threat" to the workplace, despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
 - When assessing whether an employee poses a direct threat in the workplace, the employer must base its assessment on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities.
- Based on CDC guidance and other public health authorities, the Coronavirus pandemic meets the "direct threat" standard.
- An employer *may* exclude those who test positive for COVID (or exhibit symptoms associated with COVID) from the workplace because their presence would pose a direct threat to health or safety.
- Furthermore, despite the ADA's prohibition of discrimination against employees who may be *perceived* to have a disability, the ADA nonetheless allows an employer to bar an employee from the workplace if he/she refuses to answer questions about whether he/she has COVID, symptoms associated with COVID, or has been tested for COVID, or otherwise refuses to have his/her temperature taken.

How to Safeguard Your Workplace from Pandemic-Related Harassment

- The EEOC has noted an uptick in reports of harassment in the workplace on the basis of national origin and race, particularly for those employees who are or perceived to be Asian.
- Accordingly, the pandemic presents an opportunity for employers to revisit their workplace policies and handbooks, including all EEO anti-harassment policies, to make sure they are up-to-date with federal and state law.
- Employers should also take the opportunity to remind all employees of anti-harassment policies and to encourage that all complaints be reported per the company's policy.
- Particularly as many employees may still be teleworking, employers should be aware that harassment in the workplace may occur through email, phone, or by text.
 - In these circumstances, employers should treat complaints of harassment as it would any similar complaint made in the physical workplace.
- HR managers should ensure that management and supervisors are aware of their responsibilities to report complaints of harassment, promptly investigate all such reports, and resolve potential problems before they escalate.

Special Rules to Keep in Mind with Respect to Waiver of Potential ADA Claims When Conducting Layoffs and Furloughs

- Given that some employers are considering furloughs and/or layoffs, it is also a critical time to ensure that any form severance agreements are in compliance with state and federal law.
- In particular, employers should be cautious when offering severance packages, particularly if these agreements include general waivers of any and all discrimination claims against the employer.
- Although knowing and voluntary waivers of discrimination claims under laws such as Title VII may be enforced, provisions in severance agreements that attempt to prevent employees from filing a charge with the EEOC or participating in an EEOC investigation, hearing, or proceeding are unenforceable.
- Additional rules govern written waivers of claims under the ADEA.

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