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Insights

EEOC Issues Updated COVID-19 Employment Guidance

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Yesterday, the EEOC issued additional guidance for employers addressing COVID-19 in the workplace, which can be found here. Notably, the EEOC advised that employers may not involuntarily exclude employees over the age of 65 from the workplace due to coronavirus, even if the employer acted for benevolent reasons. Such exclusion would be prohibited by the Age Discrimination in Employment Act (ADEA).

However, the EEOC noted that employers are free to provide flexibility to workers age 65+, even if it results in workers under 65 years of age being treated less favorably in comparison. Unlike the Americans with Disabilities Act (ADA), the ADEA does not entitle employees age 65+ to a reasonable accommodation based solely on age, although employers should be mindful that such employees may have medical conditions that provide them with protection under the ADA. The EEOC went on to address other COVID-19-related topics, as summarized below.

First, the EEOC confirmed that employees are not entitled to an accommodation under the ADA in order to avoid exposing a family member who may be at a higher risk of illness from COVID-19 due to underlying medical conditions. While an employer is free to provide flexibility so long as it does not engage in disparate treatment on a protected EEO basis, the ADA does not require employers to accommodate an employee based on the disability-related needs of an employee's family member.

As to flexible work arrangements, the EEOC confirmed that the ADA and the Rehabilitation Act permit employers to provide notice to all employees that the employer is willing to consider requests for accommodation or flexibility on an individualized basis, whether or not a date has been announced for such employee's return. This notice may include a list of the higher-risk underlying conditions from the CDC and should include the appropriate employer representative for employees to contact regarding a flexible work arrangement.

Next, the EEOC confirmed that so long as employers are not treating employees differently based on an EEO-protected characteristic, employers may provide flexibility to employees who act as caregivers to

school-aged children. As an example, the EEOC cautioned against treating female caregivers more favorably in this regard as compared to male caregiver employees, in violation of Title VII.

Additionally, the EEOC advised that pregnant employees may be entitled to an accommodation based on their pregnancy during the coronavirus pandemic. Under the ADA, while pregnancy is not a disability on its own, certain pregnancy-related medical conditions may entitle pregnant women to a reasonable accommodation. Under Title VII, as amended by the Pregnancy Discrimination Act, pregnant women must be treated the same as others "who are similar in their ability or inability to work." Like employees that are 65 and older, the EEOC confirmed that employers may not involuntarily exclude pregnant employees from the workplace, even if acting with good intentions.

Finally, the EEOC noted that managers should be alert to "demeaning, derogatory or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin." This form of harassment may originate in a variety of ways, including in the physical workplace, via electronic means, or through the employer's contractors and customers. Employers covered by Title VII should ensure that management is trained to recognize such harassment.