

EEOC Provides Updated Guidance on Allowable Employer Practices in Response to Pandemic

The Equal Employment Opportunity Commission (“EEOC”) provided additional guidance in September for employers who continue to respond to the COVID-19 pandemic. The EEOC has enforcement oversight for the Americans with Disabilities Act (“ADA”) as well as other federal employment laws.

Among the most important points emphasized:

- The EEOC clarified that use of telework during the pandemic does not necessarily require the employer to subsequently offer telework as a “reasonable accommodation” under the ADA once telework is no longer necessary from a public-health standpoint.
 - If there is no disability-related limitation that requires telework, then the employer does not need to provide telework as an accommodation.
 - If there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation, then the employer can choose that alternative to telework.
 - The fact that an employer temporarily excused some essential functions of a job during the pandemic does not mean that the employer cannot restore such functions once pandemic conditions recede. Therefore, telework may not always be a feasible accommodation even if it was used during the pandemic.
 - Nevertheless, the accommodation process is based on the facts of the situation and the EEOC stated that if the employee could satisfactorily perform all essential functions of the job while working remotely, a post-pandemic request for accommodation should be considered in light of that information.
- Employers following Centers for Disease Control (“CDC”) guidelines will generally be in compliance with the ADA. The EEOC states: “The ADA does not interfere with employers following recommendations of the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. Testing administered by employers consistent with current CDC guidance will meet the ADA’s ‘business necessity’ standard.”
 - Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated therewith and ask if they have been tested for COVID-19.

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- Employers may single out a particular employee for questioning or screening if there is a “reasonable belief based on objective evidence” that the employee may have the disease.
- Employers may ask generally if the employee has had contact with anyone diagnosed with COVID-19 or who may have symptoms.
 - An employer, however, may not limit the question to members of the employee’s family. Not only would the question be too limited from a public-health perspective, it would also violate the federal Genetic Information Nondiscrimination Act, which limits the ability to inquire about the health status of family members.
- During pandemic conditions, employers may bar employees from physical presence in the workplace if the employee declines to undertake reasonable screening. The employee, however, may request a “reasonable accommodation” under the ADA with respect to screening, in which case the usual ADA interactive accommodation process would apply.
- Consistent with the ADA, employee health information must be kept confidential, but some limited disclosure of COVID-related information may be necessary within the workplace in order to comply with CDC guidance. The EEOC emphasizes that employers “should make every effort to limit the number of people” who are aware of the identity of the employee.
 - Employers will need to notify those who have come in contact with an employee who is infected or suspected of infection, but such notification must take place without revealing the employee’s identity.
 - The EEOC acknowledges that for small employers the other employees may be able to discern the identity of the employee, but nevertheless employers are still prohibited from confirming or revealing the identity of the employee in question.
 - When employees are on leave or teleworking due to COVID-19 or symptoms related thereto, employers may inform co-workers of the fact but not the reason therefor.
- Employees dealing with confidential information while teleworking must “safeguard this information to the greatest extent possible” until it can be properly protected. Paper records and devices should not be left where others can access protected information.

Employers and employees with questions about paid leave requirements under the FFCRA can contact Vandenack Weaver attorneys at 402-504-1300 or info@vwattys.com.