OCTOBER 1, 2020 | DISCRIMINATION, HARASSMENT & RETALIATION

What You Should Know About COVID-19, the Americans with Disabilities Act, and the Age Discrimination in Employment Act

As the U.S. enters month seven of the COVID-19 pandemic, employers continue to grapple with how to keep employees safe without violating the rights of employees protected by the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). The Centers for Disease Control and Prevention ("CDC") has issued guidance to slow the spread of COVID-19 in the workplace encouraging employers to: (1) actively encourage sick employees to stay home; (2) conduct daily in person health checks such as temperature and symptom screenings; and (3) ensure that workers are able to follow social distancing guidelines as much as practicable and encouraging employees to wear face masks where social distancing is not possible. Employers should remain vigilant against enacting policies meant to keep employees safe but have a disparate impact on employees in a protected class.



The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") prohibits employers with 15 or more employees from discriminating against job applicants and/or employees with disabilities. If a job applicant or employee has a disability and requests an accommodation, employers must engage in an interactive process and are required to provide a reasonable accommodation to the extent it does not cause the employer undue hardship.

In the context of COVID-19, employers may screen employees entering the workplace for COVID-19 symptoms consistent with CDC guidance. For example, an employer may: (1) ask questions about COVID-19 diagnosis or testing, COVID-19 symptoms, and exposure to anyone with COVID-19 (but employers should be sure the question is broad and does not ask employees about specific family members so as not to run afoul of the Genetic Information Nondiscrimination Act ("GINA")); (2) take an employee's temperature; and (3) administer COVID-19 viral tests (but not anti-body tests). If an employee is screened and has symptoms that the CDC has identified as consistent with COVID-19, the employer may – and indeed, should – exclude the employee from the workplace. It is also okay – and again, advisable – for an employer to send an employee home who reports feeling ill during the workday.

If an employer opts to screen all employees for COVID-19, an employee may make a request for alternative

methods of screening based on the employee's disability. This request should be treated like all other requests under the ADA, as a request for a reasonable accommodation, and triggering the employer's obligation to engage in the interactive process. The employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. The employer may also request medical documentation to support the employee's request. Ultimately the employer must determine if it can provide an accommodation without undue hardship.

Employers should also be aware that, in the event that an employee refuses to be screened, the employer may – and again, should – bar that employee from the workplace. Additionally, if an employee has an unexplained absence the employer may ask the employee why for the sole purpose of determining if the absence was COVID-19 related and whether the employee is subject to mandatory quarantine. Similarly, it is generally okay for an employer to ask an employee about work/personal travel as consistent with CDC and state guidelines to determine if an employee is subject to a mandatory quarantine. If an employee is diagnosed with COVID-19, the employer may require a doctor's note as a condition of allowing the employee to return to work. Employers in the process of interviewing and hiring job candidates generally cannot ask applicants about disabilities or require applicants to have a medical exam. However, after the employer has extended a conditional offer the employer may screen job applicants for symptoms of COVID-19 so long as all employees in the same type of job are also screened.

As employers screen employees and collect medical data it is important to remember all information that is collected and recorded is subject to ADA confidentiality. To maintain employees' confidentiality, documents must be stored separately from the employee's personnel file, but may be placed in existing medical files. If an employee is diagnosed with COVID-19 or symptoms, managers should only share the name of the employee with other managers who need to know, not all managers. To maintain the employee's right to confidentiality the employer may tell coworkers the employee is teleworking or on leave, but should not reveal the reason is COVID-19 related. When notifying coworkers who were potentially exposed employers still must maintain confidentiality. An employer may say "someone at this location," or "someone on the 4th floor" has COVID-19, or words to that effect. If employees guess who the sick employee is, the employer cannot confirm or deny the employees' guesses.

With respect to pre-existing disabilities, an employee may be entitled to a reasonable accommodation for a pre-existing disability that places the employee at higher risk of serious illness from COVID-19. This accommodation request should be treated like other ADA requests. If the employee requests an accommodation, the employer must engage in an interactive process to meet the employee's needs. The employer may request medical documentation to determine if the employee has a disability and how the employer can accommodate the disability.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination in any aspect of employment, by employers with 20 or more employees, including: hiring, firing, pay, job assignments, promotions, layoffs, trainings, benefits, and any other terms or conditions of employment. Employees who are age 40 or older are protected by the ADEA.

CDC guidance states that individuals over the age of 65 are at a higher risk of developing serious complications from COVID-19. However, employers should not implement policies and procedures based solely on an employee's age. Even if an employer has the best intentions, they cannot exclude employees based on age from coming into the office. The ADEA does allow more favorable treatment of older workers, therefore an employer may be more flexible when accommodating older employees. Unlike the ADA there is no right to a reasonable accommodation under the ADEA.

Conclusion

In conclusion, an employer may take proactive measures as proscribed by the CDC to keep their employees safe while maintaining compliance with the ADA and ADEA. Employers should exercise caution and make sure that any policy, no matter how well meaning, does not cause a disparate impact and that there is no disparate treatment when selecting who is screened on employees protected by the ADA and the ADEA.



For additional resources on issues related to COVID-19, please visit Conn Maciel Carey's COVID-19 Resource Page for an extensive index of frequently asked questions with our answers about HR, employment law, and OSHA regulatory related developments and guidance, as well as COVID-19 recordkeeping and reporting flow charts.

Likewise, subscribe to our Employer Defense Report blog and OSHA Defense Report blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the FAQ page with the latest news and resources for employers.