

## Dealing with COVID-19 return to work issues? EEOC provides more practical guidance



Miriam L. Rosen | Thursday, June 18, 2020

The U.S. Equal Employment Opportunity Commission (EEOC) continues to update its COVID-19 [Technical Assistance Guidance](#) Q&A to provide employers with practical return to work guidance. In a June 11 update, the EEOC addressed questions concerning pandemic-related harassment, pregnant employees, age concerns, as well as other workplace issues.

### **Pandemic-related harassment**

The EEOC reminds employers to be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or Asian national origin, including remarks related to the coronavirus or its origins. Recognizing that many employees are not in the physical workplace, the EEOC notes that harassment may occur using electronic communication tools and suggests employers remind employees of policies prohibiting harassment.

### **Dealing with protected categories**

In returning employees to work, employers have concerns about employees who are or are perceived to be at higher risk for contracting COVID-19 due to pregnancy or age. Often, an employer's instinct is to be paternalistic and make decisions that it believes are in the employees' best interest. Regardless of the good intentions, the EEOC warns against making employment decisions based on protected status.

### **PREGNANCY**

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Even if motivated by benevolent concerns for protecting pregnant employees from COVID-19 exposure, employers may not single out workers based on pregnancy for adverse employment actions, including involuntary leave, layoff or furlough. Rather, as in any other situations, if a pregnant employee requests a reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual Americans with Disabilities Act (ADA) standard. In addition, pregnant employees may be entitled to job modifications – including telework, changes to work schedules or assignments, and leave – to the extent provided for other employees who are similar in their ability or inability to work.

### **AGE**

While acknowledging that individuals age 65 and older are at higher COVID-19 risk based on CDC's guidance, the EEOC also cautions employers about making decisions based on age even if the reasons relate to protecting employees from that risk. However, the EEOC further notes that employers are free to provide flexibility to workers age 65 and older – the Age Discrimination in Employment Act does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

### **HIGH-RISK FAMILY MEMBERS**

At the same time, the EEOC's guidance confirms that employers are not required to provide accommodations under the ADA to employees to avoid exposing family members at higher risk of severe illness from COVID-19. The 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 the employee is associated. While an employer is free to provide flexibility to an employee, the EEOC cautions that in doing so the employer should be careful not to engage in disparate treatment based on protected status.

### **CAREGIVER/FAMILY RESPONSIBILITIES**

The guidance also addresses the concerns if an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures. The EEOC states that employers may provide any flexibility as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees due to a gender-based assumption about who has child care responsibilities.

### **Alternative Health Screening**

Addressing another issue that employers are facing in the return to work environment, the EEOC guidance covers how to respond to employee requests for alternate forms of health screening due to medical conditions.

The EEOC indicates that employers should proceed as they would for any other request for accommodation under the ADA or the Rehabilitation Act. The EEOC recommends that if the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, an employer may also request medical documentation to support the employee's request, and then determine if that accommodation, or an alternative effective accommodation, can be provided absent

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undue hardship. Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under Title VII.

The EEOC's guidance is a reminder to employers that in addressing day-to-day COVID-19 return to work issues they should look to existing employment laws and apply sound and consistent practices that are compliant with those laws.

The [McDonald Hopkins Labor and Employment Response Team](#) will continue to monitor developments and provide updates on employment issues impacted by the COVID-19 crisis.

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[Team member bio](#)