

EEOC Updates COVID-19 Guidance on “High-Risk” Employees Returning to Work

By Nathan Pangrace

The Equal Employment Opportunity Commission (EEOC) has issued new guidance regarding “high-risk” employees returning to work during the COVID-19 pandemic. A revised Q&A document published on May 7, 2020, addresses the question of when an employer may bar an employee from the workplace because he or she is at higher risk of severe illness or even death from contracting COVID-19.

High-risk employees include people with underlying medical conditions, including chronic lung disease, asthma, heart conditions, severe obesity, diabetes, chronic kidney disease, liver disease, and conditions that cause a person to be immunocompromised. The EEOC previously clarified that the Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to employees with such conditions who are returning to work.

The new guidance answers the question: What should an employer do if it knows that an employee has a high-risk condition and is concerned that returning to work will jeopardize his or her health, but the employee has not requested an accommodation? According to the EEOC, the employer is not required to take any action at all. An employer’s obligations under the ADA are not triggered until the employee requests an accommodation. However, there may be instances when the employer wants to exclude the employee from the workplace. The employer may be legitimately concerned about the employee’s health due to an underlying medical condition. Or, the employer may want to avoid liability if the employee becomes severely ill or dies as the result of contracting COVID-19 at work.

The new EEOC guidance states that in such a case, an employer cannot exclude the employee from coming to work unless the employee’s medical condition poses a “direct threat” to his or her health and the threat cannot be reduced by a reasonable accommodation. According to the EEOC, the ADA’s direct threat requirement is a “high standard.” An employer must show that the individual has a disability that poses a “significant risk of substantial harm” to his or her own health. Further, the employer must conduct an individualized assessment of the employee’s situation, considering factors such as the severity of the pandemic in the area, the employee’s health, his or her job duties, the likelihood that the employee will be exposed to the virus, and measures the employer is already taking to protect workers.

Even if an employer determines that an employee’s condition poses a direct threat to his or her own health, the employer still cannot exclude the employee from the workplace if there is a way to provide reasonable accommodation. The ADA requires an employer to consider whether there are accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to work. Examples of accommodations include protective gowns, masks, gloves, erecting

physical barriers that provide separation between an employee and coworkers/the public, modification of work schedules, and moving the location of where the employee performs work if it provides more social distancing. An employer may only bar an employee from the workplace if, after going through all these steps, the employee poses a significant risk of substantial harm to himself or herself that cannot be reduced or eliminated by reasonable accommodation.

We will continue to keep you informed as the EEOC updates its guidance for employers on issues related to COVID-19. Should you have any questions, please contact one of the listed Roetzel attorneys.

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