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KD Alert - The New York Workplace and COVID-19 - Getting Back to Business (Part II): EEOC Guidance

As businesses prepare to re-open, the EEOC has issued critical guidance on how employers should navigate the many issues that will undoubtedly arise regarding the new COVID-19 workplace laws, such as the Families First Coronavirus Response Act (FFCRA), as well as those currently in place, including Title VII of the Civil Rights Act (Title VII) and the Americans with Disabilities Act (ADA), among others. Below are key takeaways from the EEOC's recent guidance.

Disability-Related Inquiries and Medical Exams

Many employers have already started to question the extent to which they may ask employees about COVID-19 symptoms, and administer tests and screenings when necessary. Anticipating such questions, the EEOC guidance offers some insight.

According to the EEOC, an employer may ask an employee who calls in sick if he or she is experiencing COVID-19 symptoms, such as fever, chills, cough, shortness of breath, or sore throat. This information however, must be maintained as confidential in accordance with the ADA.

In addition to questioning employees who call in sick, employers may also screen employees before they enter the workplace for a shift. Screening is not limited to the symptom examples listed above, but may consist of asking about COVID-19 symptoms identified by the CDC, other public health authorities, and other reputable medical sources. Specifically, in addition to the symptoms discussed above, employers may inquire about additional identified COVID-19 symptoms, such as loss of taste or smell, nausea, diarrhea, and vomiting. In addition to inquiring about symptoms, employers may also take employees' temperatures as part of the screening process.

If an employee has symptoms of COVID-19, the employer can – and should — require them to go or stay home.

The EEOC states that when symptomatic employees return to work, the employer may require a doctor's note certifying that they are fit to return. If an employee is unable to obtain a note from his or her doctor due to how busy health care professionals are during the pandemic, they may ask a local clinic to provide a form, stamp, or email to certify that they do not have COVID-19.

As for actually administering COVID-19 tests, as opposed to screening, the EEOC provides that employers may choose to test employees before they enter the workplace, but must ensure that the tests are accurate and reliable based on guidance from the FDA or CDC. For instance, employers should consider not using a particular test which has a high instance of false positives or false negatives. Employers should also bear in mind that any test only indicates whether the virus is currently present; employees testing negative could still contract the virus later. Thus, employers should still require employees to practice social distancing and regular handwashing.

Confidentiality Issues

The EEOC also issued guidance pertaining to the confidentiality issues raised by screening and testing employees. For example, if an employee tests positive for or self-identifies as having COVID-19, this information, like other medical information, should not be stored in the employee's personnel file, but in a separate medical file. Information collected from daily temperature checks should

also be stored in the same manner.

It is permissible for an employer to disclose to a public health agency the name of an employee with COVID-19. Likewise, if a staffing agency or contractor that supplies workers learns that a particular worker has COVID-19, it may disclose the worker's name to the employer, so that the employer can determine if that worker had contact with others in the workplace. However, the employer should never disclose the name of the COVID-positive employee to the employee's co-workers. Employers may only state that an unnamed employee has symptoms or has come into contact with someone who has symptoms, and the like, so that proper preventive action may be taken.

Prospective Employees and New Hires

The EEOC's guidance also addresses how employers should handle new hires and onboarding.

Job applicants may be screened for COVID-19 as long as it is done consistently, for all applicants in the same type of job. However, temperature-taking of applicants can only be performed after the employer has made a conditional offer of employment.

For any prospective employee who has COVID-19 symptoms, the start date should be delayed until they are recovered, and the appropriate certification provided. Only in cases where the employer is unable to delay the start date may the job offer be withdrawn.

The EEOC also issued guidance regarding those employees who have been identified as being at a higher risk of contracting COVID-19. For instance, an employer may not unilaterally postpone a start date simply because the prospective employee is 65 years of age or older with or without underlying medical conditions, or pregnant. Nonetheless, an employer may choose to allow such an employee to work remotely or discuss with the employee whether they wish to postpone the start date.

Reasonable Accommodations

The EEOC has provided guidance on anticipated questions employers may have regarding reasonable accommodations for their workers.

Initially, it is critical for employers to engage in the "interactive process" with all employees who request accommodations. In the haste of re-opening a business, employers are cautioned not to ignore this process or treat this issue lightly. This process, in addition to being the first line of defense to a disability discrimination claim, allows the parties to determine whether a reasonable accommodation can, in fact, be offered that does not cause an undue hardship to the employer. In doing so, it is important that both employers and employees are flexible in working towards finding a reasonable accommodation.

The EEOC classifies an undue hardship as a "significant difficulty or expense." As such, while many accommodations can be provided to employees at minimal or no cost, employers "must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic." As a result, whether or not an employer suffered a "sudden" loss of income during the pandemic and "the amount of discretionary funds" it received and how they have been utilized, are factors to consider when evaluating whether a requested accommodation would create an undue hardship.

When evaluating accommodation requests, employers may ask appropriate questions to determine: (a) whether the employee's condition necessitating the requested accommodation is a disability, (b) how the requested accommodation would assist the employee and enable the employee to keep working, (c) whether there are alternative accommodations that may effectively meet the employee's needs, and (d) whether medical documentation is needed.

If an employee who has been teleworking during the pandemic requests an accommodation for when the employee returns to work at his/her worksite, employers are guided not to delay evaluating the request. Engaging in the interactive process now potentially ensures that the employee promptly returns to the worksite upon reopening.

According to the EEOC, the ADA does not mandate that employers take action if an employee does not request a reasonable accommodation even if the employer knows that an employee has a medical condition identified by the CDC as placing the employee at "higher risk for severe illness" if they get COVID-19.

If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, an employer may provide a temporary accommodation by granting the employee's request in lieu of engaging in the more detailed interactive process.

Employers may also choose to place an "end date" on an accommodation and/or provide a requested accommodation on an interim or trial basis while awaiting receipt of medical documentation. Employers must remember, however, that upon the expiration of such an accommodation, the employer will likely need to reengage in the interactive process to determine whether the requested accommodation should be extended or an alternative accommodation needs to be considered.

Anti-Harassment

While much of the new guidance is geared towards disability discrimination and avoiding ADA violations, in light of growing acts of harassment of certain "protected classes," the EEOC recommends that employers communicate "to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic." For example, a protected characteristic can include, but is not limited to, race, color, familial status, marital status, age, disability, national origin, and religion.

PPE

The EEOC allows employers to require that employees wear protective gear and observe infection control practices. However, employers must also be mindful of reasonable accommodation requests by employees for a modification or alternative to such protective gear and infection control practices. Examinations of a reason for an accommodation request include, but are not limited to, allergies and/or an employee's religion. If such an accommodation is requested, employers are reminded not to summarily dismiss such requests, but to instead engage in the interactive process with employees.

In addition to the EEOC Guidance, employers in certain states, such as New York, where interim guidance was issued by the New York State Department of Health requiring Face Coverings for Public and Private Employees Interacting with the Public During the COVID-19 Outbreak, must keep in mind these local directives. For example, New York mandates that "employees are required to wear face coverings when in direct contact with members of the public, except where doing so would inhibit or otherwise impair the employee's health. *Employers are prohibited from requesting or requiring medical or other documentation from an employee who declines to wear a face covering due to a medical or other health condition that prevents such usage." New York employers are thus advised to refrain from requesting medical documentation from an employee who declines to wear a face covering due to a medical condition.*

The experienced Labor & Employment attorneys at Kaufman Dolowich & Voluck are available to assist. We will continue to keep you apprised of any further developments impacting the workplace, and are available to answer any questions and provide additional guidance to help you navigate the ever-changing landscape of the laws during the COVID-19 pandemic and its interplay with any other local, state or federal laws. For more information, please contact an experienced member of KD's Labor & Employment Law Practice Group.