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Updated EEOC Guidance on the ADA and Accommodations

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On April 23, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued updated FAQs to guide ongoing testing and workplace safety. The EEOC clarified that employment discrimination laws are not intended to interfere with an employer following CDC, OSHA, or local and state guidelines during the COVID-19 pandemic.

Employers should consult with counsel to determine whether additional requirements apply to your business (as state and local requirements may be more stringent).

EEOC Updated Guidance: The new EEOC guidance address, medical examinations, confidentiality of medical information and reasonable accommodations. As of this alert, the EEOC continues observance of relaxed ADA regulations, so that employers may continue to take body temperatures of employees (though it cautions that some individuals with COVID-19 do not have fever as a symptom), and may also implement mandatory COVID-19 testing prior to returning to work.

The EEOC confirmed that employers may administer COVID-19 tests to determine whether employees are currently infected before allowing employees to return to work. This guidance is consistent with the requirement that medical testing be “job related and consistent with business necessity,” as employees who test positive for the virus pose a “direct threat” to the health and wellbeing of other employees. Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. The EEOC refers employers to U.S. Food and Drug Administration guidance about what may or may not be considered safe and accurate testing, and to ensure testing procedures are subject to all safety, confidentiality, and accuracy standards, including OSHA and HIPAA requirements. For all other unrelated COVID-19 medical issues, employers must continue to follow traditional EEOC guidance on medical inquiries, the ADA, and application of workplace discrimination laws.

Employers should also continue to follow current CDC guidance and consult current requirements from local public health authorities, and check for updates. The EEOC updated guidance also reminds employers that a negative test does not mean the employee will not acquire the virus later.

The EEOC continues to advise employers to follow the ADA and the interactive process when evaluating an employee's request for reasonable accommodation. If an employee requests an accommodation, the employer may still request information to determine if the conditions is a disability. The employer may also choose to provide a temporary accommodation because of limitation placed on the interactive process by

the COVID-19 pandemic. However, employers should be clear that the temporary accommodation and the shortened interactive process are solely related to the restrictions created by the COVID-19 pandemic and are not a change to the employer's permanent and long-term policies and procedures. The employer must also be clear that when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. Employers may wish to devise end dates for the temporary accommodation, like a specific date, or when the government releases changes to restrictions, or upon receipt of medical documentation from the employee.

EEOC updated guidance also recognizes that there may be heightened emphasis placed on the “undue hardship” to the company in evaluating a requested accommodation, given applicable governmental restrictions and financial impact to an employer.

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources. But, the sudden loss of some or all of an employer's income stream because of the COVID-19 pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not provide an employer the blanket ability to deny any requested accommodation but can change the focus of the interactive process.

In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now. For example, it may be significantly more difficult during the pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. Or, it may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

Return to work will be a dynamic and evolving process. As government stay-at-home orders and other restrictions are modified or lifted in an employer's area, employers should continue to follow CDC and other public health authorities and doing so will be in line with EEOC guidance and compliance with the ADA and workplace discrimination laws. Employers should remain mindful however, that they may not engage in unlawful disparate treatment based on protected characteristics in decisions related to testing, screening and other workplace decisions during the COVID-19 pandemic.

Finally, employers may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols), based on

CDC guidance and state and local orders.

Trump Administration Update: The Trump Administration has announced as of 4.29.20, it will not be extending its federal social distancing guidelines in light of states implementing state specific orders for economic re-opening.