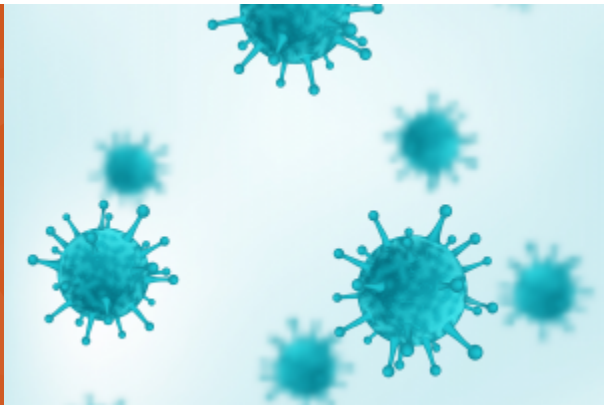
COVID-19 Alert: Employer Guidance Update

EEOC Updates COVID-19-Related Employer Guidance

June 15, 2020



The U.S. Equal Employment Opportunity Commission ("EEOC") again updated its employer guidance related to COVID-19 late last week, this time with guidance related towards warning employers against falling into traps related to age discrimination or age bias when bringing employees back to work facilities, as well as discrimination based on other factors such as race or national origin, and pregnancy and sex.

Age Discrimination

The Center for Disease Control (CDC) has listed people over the age of 65 as "high risk" of becoming severely ill by COVID-19. The EEOC warns, however, that employers are barred from "involuntarily excluding" people over 65 who want to go back to work under the Age Discrimination in Employment Act (ADEA), a federal statute that protects workers over the age of 40 from job-related age bias and discrimination.

The EEOC previously updated its guidance on how employers should handle reasonable accommodations under the ADA when employees return. You may view Morse's previous alert on those updates here. The new EEOC guidance addresses the interaction between the ADA reasonable accommodation guidance and the treatment of workers over the age of 65. While the EEOC reminds employers that the ADA requires an employer to provide reasonable accommodations to those individuals with qualifying disabilities, the EEOC makes clear that while workers who are over 65-year-old fall into the CDC's high-risk category, the ADA provides no such reasonable accommodation requirement to those individuals (unless they otherwise have a qualifying disability). While the employer is free to offer such flexibilities if they choose to, the EEOC warns that employers should be careful not to single out workers over the age of 65 in offering those flexibilities. Similarly, the employer must be careful not to single out older workers in other ways, such as requiring those individuals to wear a mask, while other employees are not. In such instances, the employer risks violating the ADEA "even if the employer acted for benevolent reasons" in trying to protect older workers.

Harassment and Discrimination Based on Race or National Origin

The EEOC also addressed harassment and discrimination of employees based upon race, national origin, or perceived race or national origin, such as with employees who may be perceived as Chinese or of Asian national origin. The EEOC reminds employers that Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits harassment based upon race or national origin, and that employers should be proactive in identifying and stopping any potential harassment.

The EEOC reminds employers that their obligations to protect employees from harassment do not change even if workers are performing duties at home. The employer is still required to act if, for example, one worker is harassing another via email or through teleconferences while working at home. The protection also extends to those employees who may be on leave.

The EEOC also reminds employers that harassment may come from sources other than employees, such as contractors, clients, or customers. Employers still have an obligation to protect employees from harassment from these various sources.

Pregnancy and Sex Discrimination

The EEOC also reminds employers that they cannot involuntarily exclude pregnant workers from the workplace based upon concerns related to COVID-19. Title VII protects pregnant workers from discrimination against adverse employment actions including involuntary leave, furlough, or layoff.

Additionally, while pregnancy is not considered a protected disability under ADA that would require an employer to provide a reasonable accommodation, pregnancy *may* become a protected disability if the pregnant worker requests a reasonable accommodation based upon a pregnancy-related medical condition.

Similarly, the EEOC reminds employers that they should be mindful of creating policies or otherwise treating employees differently based upon sex, especially when providing flexibilities to those employees who have caretaking responsibilities for school-aged children with school and camp closures. Employers may provide flexibilities to such workers "as long as they are not treating employees differently based on sex or other EEO-protected characteristics." The EEOC provides the example that employers should avoid providing more favorable flexibilities to female employees versus male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please contact the Firm should you have questions concerning this subject, or any other COVID-19 response matters.

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