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EEOC UPDATES COVID-19 TECHNICAL ASSISTANCE

On Friday, April 17, 2020, the Equal Employment Opportunity Commission ("EEOC") updated and expanded its technical assistance publication addressing questions relating to the COVID-19 pandemic and federal equal employment opportunity laws.

The publication expanded on prior guidance by adding questions and answers to anticipated return to work scenarios, reasonable accommodation situations and harassment. The following is an overview of the updated and expanded guidance.

ADA - INTERACTIVE PROCESS

The EEOC makes clear that during a pandemic, an employer is still permitted to engage an employee in the interactive process for information related to a condition and potential accommodation. An employer may still request information, including medical documentation, to determine if the condition is a disability defined by the Americans with Disabilities Act ("ADA") ("a physical or mental impairment that substantially limits a major life activity, or a history of a substantially limiting impairment"). Further, an employer may still inquire into whether an employee's disability (at home or in the workplace) necessitates an accommodation.

Because certain accommodations may only be necessary during a pandemic or will change when government restrictions are lifted, an employer may also forego or shorten the interactive process, providing a temporary or short-term accommodation on an interim or trial basis. With all of these accommodation modifiers, an employer may choose to place an end date on the accommodation but will need to consider an extension if government restrictions do not change.

Furthermore, employers may want to take a proactive approach to the interactive process and ask employees with disabilities to request accommodations that they believe they may need in the future when the workplace re-opens. The EEOC also notes, an employer should prepare for reasonable and/or religious accommodations if the employer plans to require employees to wear protective gear.

ADA - UNDUE HARDSHIPS

As was before the current pandemic, an employer does not have to provide an employee a particular reasonable accommodation if it would pose an "undue hardship" (i.e., significant difficulty or expense). While certain accommodations may have not posed an undue hardship prior to COVID-19, they may pose one now.

Considering the factors of a particular job and/or workplace, an employer may consider whether current circumstances create "significant difficulty." The EEOC gives several examples of significant difficulty, including "it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking."

When considering an employer's overall budget and resources, "significant expense" rarely was found to be an undue hardship before the pandemic. However, the pandemic has changed this factor. While employers still cannot reject every accommodation that has a financial impact, "an employer must weigh the cost of an accommodation against its *current* budget while taking into account constraints created by this pandemic."

ADA - SCREENING EMPLOYEES FOR COVID-19 WHEN REOPENING THE WORKPLACE

Finally, the EEOC reminds employers that the ADA permits employers to make disability-related inquiries and to exclude employees with medical conditions that pose a direct threat to the health or safety of others. During a pandemic, "direct threat" determinations should be based on the best available objective medical evidence from the CDC and/or other public health authorities. Therefore, employers will be acting consistently with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities.

As the COVID-19 situation is rapidly developing, employers should continue to watch for additional guidance from the EEOC and/or local officials. Please refer to Hall Render's COVID-19 [resource center](#) webpage and hotline at (317) 429-3900 for any questions, as well as up-to-date information regarding the virus.

If you have any questions on issues discussed in or related to this post, please contact [Larry Jensen](#) at ljensen@hallrender.com or (248)

457-7850 or your regular Hall Render attorney.

Special thanks to Claire Bailey, law clerk, for assistance in preparing this article.

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