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EQUAL EMPLOYMENT OPPORTUNITY LAW CONSIDERATIONS DURING COVID-19

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On April 23, 2020, the Equal Employment Opportunity Commission ("EEOC") updated its guidance titled, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws." All employers ranging from those whose businesses have been deemed "essential" amid the COVID-19 pandemic to ones planning to safely transition their employees back into the workplace once government restrictions have been relaxed will want to be cognizant of these considerations. The EEOC emphasizes that while laws such as the American with Disabilities Act (ADA) and the Rehabilitation Act continue to apply during the time of the COVID-19 pandemic, they do not interfere with or prevent employers from following the Center for Disease Control and Prevention's ("CDC") or state/local public health authorities' guidelines.

COVID-19 TESTING

As part of its April 23, 2020 update the EEOC clarified that employers may test their employees for the presence of COVID-19 before entering the workplace. While doing so, employers should be sure to consistently implement such tests and do so in consideration of whether an individual with the virus entering the workplace could pose a direct threat to the health of others. Employers should also ensure that any COVID-19 tests are accurate and reliable to be consistent with the ADA. Employers will want to review the latest guidance from the US Food and Drug Administration before implementing any testing protocol.

Employers that choose to implement testing should communicate to all employees that their temperature is being taken for purposes related COVID-19 workplace safety rather than any other medical impairment or disability. Employers that choose to perform temperature tests must be consistent with each individual rather than singling out any particular employee for testing. Moreover, employees' temperatures should be taken in private, away from other individuals. The results of and any documentation tracking employees' temperature readings must be kept confidential and separate from their personnel file.

Should an employee have a fever (defined by the CDC as a temperature of 100.4o or higher) an employer can send an employee home. The ADA will not interfere with employers who follow CDC guidelines if they ask their employees whether they are experiencing any COVID-19 related symptoms, or who require an employee to stay home or ask an employee to leave the workplace if they are experiencing COVID-19 symptoms. The guidelines state an employee not attempt to return to work until they are fever-free for at least 24 hours. In consideration of the developing nature of information about COVID-19, employers should continue to monitor the CDC guidance on emerging symptoms associated with the disease.

REASONABLE ACCOMMODATIONS

As with any pre-COVID-19 reasonable accommodation request, employers can shield against ADA claims by engaging in the interactive process with their employees about their specific medical needs. There are certain types of reasonable accommodation requests that

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have increased with concern about COVID-19 such as those from individuals whose disability places them at greater risk for COVID-19.

Although there is no comprehensive list of impairments, according to the CDC those may include individual with heart disease, diabetes, lung disease or asthma, a weakened immune system, kidney disease, cirrhosis, etc. Though individuals who are over 65 years of age and those who are pregnant may also be at higher risk, they will not qualify to receive accommodations under the ADA on this basis alone.

In addition, while COVID-19 is stressful for most, employees with preexisting mental health conditions (i.e., anxiety disorder, post-traumatic stress disorder, obsessive-compulsive disorder, etc.) may also require a reasonable accommodation as they may have more difficulty coping with the disruption that COVID-19 has had on their daily lives.

Employers are encouraged to begin the interactive process with employees requesting an accommodation as soon as possible. Employers can do this as employees are teleworking as opposed to waiting for them to return to the workplace, allowing ample time to gather the requisite information. As with any accommodation request, employers may ask questions to determine whether the condition is a disability, how the disability creates a limitation, how the requested accommodation will effectively address the limitation and whether another form of accommodation could effectively address the issue.

While employers can certainly request documentation to establish the employees' right to receive an accommodation, it is not required in order to approve an accommodation under the ADA. Employers are encouraged to be flexible and to consider alternative means for obtaining sufficient information.

Given the current strain on the healthcare system, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide certain documentation. A previous request for an accommodation for the same impairment, information from a personal medical record from a past visit to a healthcare provider, insurance documents or a prescription may support that an employee has a disability. Likewise, rather than obtaining the usual fitness-for-duty documentation employers may request authorization to communicate with the employee's healthcare provider directly or rely on local clinics to provide a form, a stamp, or an email to certify that the employee can return to work without restrictions.

An employer may find that providing a reasonable accommodation on an interim or trial basis is a viable option for situations in which it is awaiting receipt of medical documentation or for employees who have a COVID-19 specific need because of a pre-existing disability. Employers can do this by providing a specific end date on the accommodation such as a month from the date of the request or when the employee returns to the workplace due to relaxation of government restrictions.

In determining which reasonable accommodations to offer, there are a number of low-cost solutions. Employers may alter the work environment of employees who request reduced contact with others due to a disability by designating one-way aisles; using Plexiglas, tables

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or other barriers to ensure minimum distances between customers and coworkers; or, provide other accommodations that reduce chances of exposure.

Employers also may receive a spike of telework requests due to social distancing requirements. If an alteration to the employees' work environment is needed to accommodate such requests, employers may be able to do so by temporarily restructuring marginal job duties or temporarily transferring the employee to a different position. Employers who implement teleworking to slow or stop COVID-19 are not required to automatically grant teleworking as a reasonable accommodation after the pandemic passes. This is particularly true where the temporary teleworking arrangement excused an employee from performing all of the essential functions of their job. As was the case prior to COVID-19, an employer is not required to provide a reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense" to its business.

The circumstances created by COVID-19 are certainly relevant to whether the requested accommodation poses an undue hardship. For example, it may be significantly more difficult to conduct a needs assessment or there may be much less discretionary funds currently available. However, these considerations do not give employers free reign to reject any accommodation that poses a unique difficulty or costs money. If a particular accommodation could be an undue hardship, employers and employees should work together to determine if there may be a different accommodation that is less burdensome.

Litchfield Cavo attorneys are continuously monitoring the complexities of COVID-19 and are ready to assist on all coronavirus-related legal matters. To discuss how the EEOC guidelines impact your workforce's safe transition back to their workplace may impact your Illinois claims, please contact Victoria Vanderschaaf and please visit LitchfieldCavo.com/ COVID-19.

Victoria E. Vanderschaaf is an attorney in Litchfield Cavo's Chicago office. She focuses her practice primarily in employment and labor law and is a participant in Litchfield Cavo's Covid-19 Resource Team. Victoria earned her law degree from Loyola University of Chicago School of Law, *magna cum laude*. Victoria can be contacted at Vanderschaaf@LitchfieldCavo.com or 312.781.6680.