Jones Waldo Legal Alert

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GOVERNMENT AGENCIES ADDRESS ISSUES RELATING TO HIGHER-RISK EMPLOYEES AND COVID-19

As various states and municipalities across the country lift shutdowns and begin easing COVID restrictions, employers are faced with complex questions about safely bringing their employees back to the workplace. One area of particular concern involves employees with medical conditions that place them at higher risk for severe disease from the novel coronavirus. The EEOC, OSHA, and CDC all have offered guidance on this issue.

As discussed in more detail in our last update, OSHA says that employers should develop infectious disease preparedness plans based on the exposure risk involved in each job (high, medium, or low), including whether that job might expose an individual worker who is high risk. OSHA does not specify exact steps to be taken when an employee is higher risk, but the implication is that the employer should take particular care to implement mitigation steps when a job is deemed higher risk because a more vulnerable employee fills it. For more information, see the OSHA guidance found at: OSHA Guidance.

CDC addresses the issue more expressly, saying: “Be aware that some employees may be at higher risk for serious illness, such as older adults and those with chronic medical conditions. Consider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers and visitors, or to telework if possible.” (CDC guidance found at: CDC Guidance) CDC also has published a pamphlet telling higher risk individuals how they can protect themselves: CDC Pamphlet

Most recently, the EEOC weighed in with yet another update to its previously updated COVID-19 technical assistance publication. (Update whiplash, anyone?) Last week, the agency offered guidance relating to higher-risk employees. See EEOC Guidance). Specifically, EEOC reminds employers that a higher-risk employee may be entitled to a reasonable accommodation under the ADA, and that such accommodation may be requested by the worker without using the term “reasonable accommodation.” What must the worker seeking accommodation do? Simply notify the employer that “she needs a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing.” Once an employer receives a request for accommodation, the employer should engage in the interactive process, and may seek medical documentation or ask questions to obtain needed information. Through that process, the employer should determine whether the worker has a disability and whether there is a reasonable accommodation that can be provided without undue hardship.

The situation described above, where a vulnerable worker asks for an accommodation, is perhaps the easiest one to navigate. What happens when an employer knows that a worker has a condition that places him or her in a high-risk category for severe disease from COVID, but the employee has *not* requested an accommodation? How does the ADA apply? EEOC responds: “First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.” EEOC further cautions that an employer worried about the worker’s health being jeopardized by returning to work “may not exclude the employee—or take any other adverse action—*solely* because the employee has a disability” that increases risk from the virus. Instead, the employer must conduct an *individualized* assessment of whether the employee’s

condition poses a "direct threat" to his or health, and whether that threat can be remedied or mitigated by a reasonable accommodation. An employer cannot meet the high burden for showing a direct threat simply by showing that the employee has a condition CDC considers a risk factor for COVID-19. Rather, the analysis must "be an individualized assessment based on a reasonable medical judgment about this employee's disability—not the disability in general—using the most current medical knowledge and/or the best available objective evidence." ADA regulations mandate that an employer weigh factors like "the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm." 29 C.F.R. §1630.2(r). In the context of the current pandemic, EEOC suggests relevant factors may include "the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled) and his particular job duties," as well as the likelihood of virus exposure at the worksite, including any mitigating measures in place (e.g., mandatory social distancing).

Where an employer (after a thorough, individualized analysis) determines that returning to the worksite poses a direct threat to the worker's health due to disability, the next step is to evaluate whether some reasonable accommodation can be made to eliminate or sufficiently reduce the risk, while allowing the worker to perform essential job functions. EEOC suggests accommodations like telework, leave, reassignment to a job in a place that might be safer for the employee or that can be performed remotely, modifying work schedules, and eliminating or substituting non-essential job functions. Other possible accommodations include personal protective equipment, protective barriers between the worker and the public, and increasing space between the worker and others. EEOC again asks employers and workers to be "creative and flexible" in finding reasonable accommodations during the pandemic, and suggests the Job Accommodation Network (www.askjan.org) as a possible resource in finding effective accommodations.

As the COVID-19 pandemic continues to unfold, medical and agency guidance likely will be further modified and updated. Stay tuned to these updates to keep current! Employers with questions relating to higher-risk employees may wish to consult with experienced employment counsel.

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