



Labor & Employment Issues Client Alert

Pitta LLP
For Clients
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EEOC ISSUES UPDATED GUIDANCE ON FIGHTING COVID-19 WITHOUT DISCRIMINATION

Since the outbreak of the COVID-19 pandemic, employers have worried that their efforts to protect their workplaces could run afoul of the federal Americans With Disabilities Act (“ADA”) and State or local Human Rights laws. In response to these concerns, on March 21, 2020, the U.S. Equal Opportunity Commission (“EEOC”) updated its Pandemic Preparedness in the Workplace and the Americans With Disabilities Act guidance (the “Guidance”) to specifically address COVID-19. The Guidance strikes a welcome balance between common sense measures permitted in order to stem the virus on one hand and prohibited ungrounded bias on the other.

At the heart of the Guidance is the realization that COVID-19 poses a “direct threat” to the afflicted and co-workers, thereby permitting the employer to take targeted action to avoid the threat. For examples, an employer MAY:

- Send an employee home if showing flu-like symptoms
- Ask employees who feel ill at work or call in sick, about their symptoms such as fever, chills, cough, shortness of breath or sore throat
- Measure an employee’s body temperature
- Inquire as to travels to hot spots
- Assign employees to work from home
- Require employees to adopt infection-control practices such as hand washing, coughing and sneezing etiquette, and personal protective equipment (masks, gloves)
- Inquire as to the employee’s reason for an absence

In all cases, the employer should preserve confidentiality on a need to know basis.

On the other hand, an employer may not discriminate against employees based on generalities and must engage in reasonable accommodation under the circumstances. Thus, an employer may not per se bar Asians or persons suspected of being vulnerable (over age 60, pre-existing health condition), and for those actually at-risk the Employer should attempt to accommodate as by allowing the employee to work under more protective circumstances (remote, low personal contact).

The Guidance also addresses hiring during the pandemic and return to work issues after COVID-19 passes, reminders that life goes on. Not surprisingly, so do lawsuits. The first COVID-19 based discrimination actions were filed in Manhattan federal court late last week, and the EEOC has begun tracking COVID-19 related cases. Applying common sense and legal guidance now can yield a safer environment immediately and in better days to come.

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