

Friday, May 8, 2020

## **EEOC PROVIDES NEW GUIDANCE ON ACCOMMODATING WORKERS WHOSE MEDICAL CONDITIONS MAKE THEM MORE VULNERABLE TO COVID 19 ILLNESS**

*THE EEOC Reissues Guidance on Accommodations for Coronavirus Pandemic Disabilities Under ADA*

On Thursday, May 7, the U.S. Equal Employment Opportunity Commission provided a road map for how businesses should go about accommodating workers with medical conditions during the coronavirus pandemic. The new guidance was actually a revised version of guidance it previously published but pulled down because it was "misinterpreted."

The guidance is the latest addition by the EEOC to a technical assistance document on its website that answers various questions employers have been faced with as they respond to the coronavirus pandemic. It details how the Americans with Disabilities Act applies in situations in which an employer knows a returning employee has an underlying medical condition that places them at risk of becoming severely sick if they contract COVID-19, but the employee hasn't asked for any accommodation.

Although the EEOC posted a previous version of the guidance Tuesday, May 5, the agency withdrew it hours later for revision because the information it contained "was ... misinterpreted in press reports and social media."

On Thursday, the agency elaborated on that explanation, saying that the guidance was revised to make clear that **the ADA doesn't allow employees to be barred from going back to work only because they have medical conditions — like serious heart problems, diabetes and asthma — that the Centers for Disease Control and Prevention has said make people more susceptible to becoming severely ill if they become infected with the virus.**

"It is important that employers understand that the ADA does not allow them to act against employees solely because the employee has a CDC-listed underlying medical condition," EEOC legal counsel Andrew Maunz said in a statement announcing the new guidance. ***"Employers must do a thorough direct threat analysis, which includes an individualized assessment based on relevant factors and a determination of whether the threat can be reduced or eliminated through a reasonable accommodation."***

The EEOC noted in Thursday's revamped guidance that **the ADA doesn't require employers to take any action if workers don't ask for an accommodation.**

But **if the business is worried that a worker's health will be imperiled if they return to work, the EEOC cautioned that excluding them from the workplace isn't allowed under the ADA unless the employee's disability "poses a 'direct threat' to his health that cannot be**

eliminated or reduced by reasonable accommodation," adding that the ADA's "direct threat requirement is a high standard."

The EEOC said that instead of this, ***employers must conduct an "individualized assessment" of whether a worker's disability poses a direct threat to their health that is "based on a reasonable medical judgment about this employee's disability — not the disability in general — using the most current medical knowledge and/or on the best available objective evidence."*** That sort of analysis by the employer should include ***consideration of a wide range of factors, including the severity of the potential harm to the worker, the chances that such harm will occur, the likelihood that a person will be exposed to COVID-19 at work and the potential impact of any protective measures the employer is taking to protect the workforce as a whole,*** according to the EEOC's guidance.

***If a business does conclude that a worker's disability poses a direct threat to that person's health, the EEOC said the individual still can't be barred from work "unless there is no way to provide a reasonable accommodation" that doesn't pose an undue hardship on the employer.***

If such an accommodation doesn't exist, employers must weigh other options like telework, leave, or reassigning a worker to a different job that allows them to work in a place that is safer for them, the guidance said.

"The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions," the EEOC said in its guidance. **"An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation."**

The latest guidance, along with two others that were posted by the EEOC on Tuesday, was part of the "Return To Work" portion of the agency's expanding Q&A document, which it has updated periodically in recent weeks to tackle pandemic-related issues affecting American workplaces. If you have any questions relating to this, call our offices at (404)979-3150 or Michael Caldwell at (404)406-5680.