COVID-19 Alert: "Higher Risk" Employees

EEOC Issues Guidelines with Respect to COVID-19 "Higher Risk" Employees

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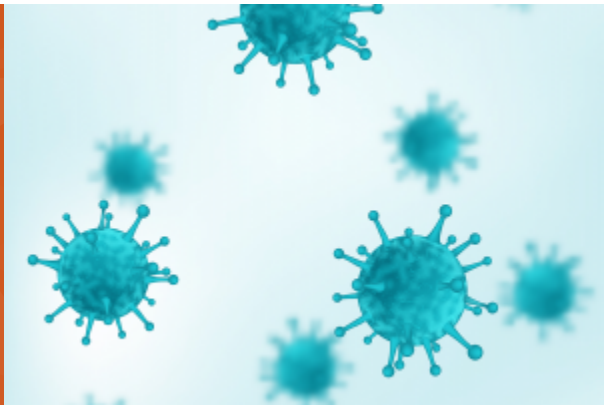

The Centers for Disease Control and Prevention ("CDC") has identified certain groups of individuals as "higher risk" for severe illness from COVID-19. These higher-risk groups include:

- People age 65 years and older;
- People who live in a nursing home or long-term care facility; and
- People of all ages with underlying medical conditions, particularly if not well controlled, including:
  - People with chronic lung disease or moderate to severe asthma;
  - People who have serious heart conditions;
  - People who are "immunocompromised;"
  - People with severe obesity (body mass index [BMI] of 40 or higher);
  - People with diabetes;
  - People with chronic kidney disease undergoing dialysis; and
  - People with liver disease.

A growing number of states have effected, or have announced, plans that relate to an easing of shelter-in-place and business closure orders. Many of these plans incorporate specific instructions that relate to higher risk employees, including instructions that exclude higher risk employees from worksites, under certain circumstances.

As emphasized in a recent federal Equal Employment Opportunity Commission ("EEOC") guidance (the "Guidance"), state re-opening standards that relate to higher risk employees must be interpreted, *and applied by employers*, in accordance with federal Americans with Disabilities Act ("ADA") anti-discrimination standards.

A summary of the EEOC Guidance is as follows:

What the Guidance Says About ADA Protections For Higher Risk Employees

The ADA is a civil rights law that prohibits discrimination against, and requires employers to reasonably accommodate, employees with disabilities. The ADA defines "disability" as a physical or mental impairment that substantially limits one or more major life activities.

The Guidance instructs that higher risk employees are "disabled" for purposes of ADA protections. As such, a higher risk employee may be excluded from work *only* if their disability poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation. The Guidance is plainly written on this point, and states in relevant part:

> If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, **the ADA does not allow the employer to exclude the employee – or take any other adverse action – *solely* because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation**.
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> The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health . . . A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination 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 on the best available objective evidence. The ADA regulation requires an employer to consider 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. Analysis of these factors will likely include considerations based on 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. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.
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> Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship). 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. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). **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**.

What Does the EEOC Guidance Mean for Employers?

The Guidance implies two consequences for employers:

First: The Guidance appears to instruct that, in the COVID-19 context, a pre-existing health condition, that falls within a higher risk category, is a covered "disability" whether or not that pre-existing condition, in fact, limits a major life activity. This instruction represents a significant expansion of the ADA's existing coverage scope, and requires employers to adjust existing ADA policies and procedures accordingly.

Second: The Guidance requires employers to engage in robust, highly individualized interactive processes with their higher risk employees to determine the availability of appropriate, reasonable accommodations. This instruction may require employers to devote additional time and resources to accommodation processes, and may require employers to adopt significant changes to their worksite operations. Employers should recognize these contingencies when modeling re-opening strategies and policies, in light of state and local requirements.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please contact the Firm should you have questions concerning this subject, or any other COVID-19 response matters.

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