

EEOC Updates COVID-19 Disability Accommodation Guidance to Address Higher-Risk Employees Returning to Work

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Since the outset of the COVID-19 pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) has issued instructions, statements, and guidance to help employers navigate [COVID-19's workplace impact](#). On May 5, 2020, the EEOC issued an update to its [Technical Assistance Guidance on Disability Accommodation](#) to address questions regarding employees at higher risk for severe illness from COVID-19. Within a few hours, the EEOC withdrew a portion of its guidance (G.4) because it was “misinterpreted in press reports and social media.” On May 7, 2020, the EEOC issued revised guidance for the same question. The ever-evolving guidance by the EEOC reflects the challenges many employers face when balancing reasonable accommodations with protections for vulnerable employees. Below, we provide a brief summary of the EEOC’s guidance, as well as a few points for consideration.

Individuals at Higher Risk for Severe Illness

According to the U.S. Centers for Disease Control and Prevention (CDC), people aged 65 years and older and people of any age who have serious underlying medical conditions may be at higher risk for severe illness from COVID-19. The CDC includes the following as serious medical conditions (if not well controlled): chronic lung disease, asthma, heart conditions, immune deficiencies, cancer, HIV or AIDS, severe obesity, diabetes, kidney disease, and liver disease.

Reasonable Accommodation for Higher-Risk Employees

As the EEOC explains, higher-risk employees—or a third party, such as an employer’s health care practitioner—who desire or need reasonable accommodation must let the employer know verbally or in writing that the employee needs a job modification related to an underlying medical condition. As always, the employee need not use the magic words “reasonable accommodation” or “Americans with Disabilities Act (ADA).” If the need for an accommodation is not obvious, the employer may request medical documentation or ask the employee questions to determine whether the employee’s disability requires accommodation.

The EEOC suggests questions that address (1) how the requested accommodation will effectively address the limitation that the disability places on the employee’s ability to perform his or her essential job functions, (2) whether another form of accommodation could effectively address the issue, and (3) how a proposed accommodation would enable the employee to continue performing the position’s essential functions. This all is part of the interactive process that an employer must



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undertake to determine if a reasonable accommodation exists that would allow the employee to perform his or her essential job functions absent undue hardship. The employer should consider documenting the interactive process.

Higher-Risk Employees and Direct Threats to Health or Safety

The guidance also addresses the situation where an employer knows that an employee is at higher risk, but the employee has not requested an accommodation. Although the ADA does not mandate that the employer take action, the guidance makes clear that the employer must proceed cautiously before excluding the higher-risk employee from the workplace. The employer must conduct an individualized “direct threat” analysis and engage in the interactive process to determine whether a reasonable accommodation would reduce or eliminate the threat.

The ADA’s direct threat requirement is a high standard. “Direct threat” under [29 C.F.R. Section 1630.2\(r\)](#) means “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

The mere fact that the employee has a higher-risk condition on the CDC’s list does not satisfy the direct threat standard. Instead, the employer must conduct an individual assessment of the employee’s ability to perform the essential functions of the job safely, relying upon current medical knowledge (not stereotypes) to make the assessment.

In determining whether an employee poses a direct threat, employers are required by the ADA 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.”

Ultimately, an employer may bar an employee from the workplace only if, after going through all the steps, the employer determines that the employee poses a significant risk of substantial harm to himself or herself that cannot be reduced or eliminated by reasonable accommodation.

Accommodations That May Eliminate or Reduce a Direct Threat

The EEOC offers several examples of accommodations that may eliminate (or reduce to an acceptable level) a direct threat, such as providing enhanced protective gowns, masks, and gloves; erecting barriers; eliminating nonessential job functions; modifying work schedules; or moving the employee’s work location to a more isolated area. The EEOC also recommends resources to help identify possible accommodations and encourages employers and employees “to be creative and flexible” when evaluating accommodation issues during the COVID-10 pandemic.

Considerations for Employers

As employers are confronted with issues posed by the ongoing pandemic, they may want to consider a few practices:

- Conducting individualized direct threat risk assessments
- Documenting the interactive process
- Consulting reliable resources for guidance on workplace accommodation issues

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Critical information for employers is also available via the firm's [webinar programs](#).