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EEOC Issues Guidance for Employers on Telework as a Reasonable Accommodation Amidst a Global Pandemic

As state and local governments roll back restrictions put into place to curb the spread of COVID-19, employees are increasingly seeking to continue teleworking for a variety of reasons, including being afraid of catching COVID-19 in the workplace, having an underlying medical condition that makes them more vulnerable to severe medical issues if they contract COVID-19, not wanting to expose another member of their household to COVID-19, and lack of child care. The specific reason for a telework request is important and governs the employer's response.

The U.S. Equal Employment Opportunity Commission (EEOC) has recently issued guidance to assist employers in assessing reasonable accommodations under the Americans with Disabilities Act (ADA) in light of the COVID-19 pandemic.

Employees With Disabilities

Employers have no obligation to provide telework arrangements for employees who have a general fear of catching COVID-19 in the workplace. Employees with certain underlying medical conditions, however, may seek telework as a reasonable accommodation. The Centers for Disease Control and Prevention (CDC) has published a list of medical conditions that may put certain employees at a higher risk for severe illness related to COVID-19. In addition, as of October, more than 7 million Americans have been infected with COVID-19. Although the long-term effects of COVID-19 are unknown, the CDC and other medical groups are actively working to understand how the virus affects the health of individuals. For instance, according to the CDC's website, an individual may suffer heart damage as a result of contracting the virus.

Employers must engage in an interactive process or cooperative dialogue with any employee who requests an accommodation to continue to telework in light of a disability. After receiving the request, an employer should seek medical documentation to determine whether the individual has a disability and should provide a reasonable accommodation, including telework, if it can do so without undue hardship.

Employers are generally not required under the ADA to allow disabled employees to work remotely. In its September guidance, the EEOC clarified that employers are not required to grant the ability to telework as a reasonable accommodation to every employee with a disability who requests it. The EEOC requires employers to look at the nature of the disability, and if the employee's disability-related limitation does not require working remotely, then there is no obligation to provide telework as an accommodation. Similarly, if an employer is able to address effectively a disability-related limitation with another form of reasonable accommodation at the workplace, then the employer can choose that alternative.

The ADA does not require employers to eliminate an essential job function as an accommodation. Employers may have temporarily excused performance of an essential job function because employees worked remotely due to COVID-19. However, that does not mean the employer has changed the essential job functions of a particular position. Employers should reaffirm employees' essential job functions when returning employees to the workplace. After the workplace reopens, employers do not have to grant an accommodation to telework if such accommodation means the employee cannot perform his or her essential job functions.

Before the pandemic, employers may have denied an employee's request to telework as a reasonable accommodation due to the employer's concerns about whether the employee could perform his or her essential functions remotely. If the employee worked remotely during the pandemic, the period when the employee teleworked could be relevant information

when considering the renewed request and likely will be reviewed by the EEOC and state administrative agencies in determining whether the employer could have provided the accommodation without undue hardship.

Employees Who Do Not Want To Expose Family Members or Other Persons With Whom They Associate

The EEOC has issued guidance to employers on how to handle requests from employees without a disability who do not wish to expose another member of their household to COVID-19. Employers are not required to provide an accommodation under the ADA to employees without a disability based on the disability-related needs of a member of their household or another person with whom they associate. Although the ADA does not require an accommodation, it prohibits disparate treatment or harassment based on association with an individual with a disability.

Employees and Child Care

With schools offering various approaches to learning this school year—from fully remote options to in-person sessions and hybrids of both—employers have had to respond to telework inquiries from employees without disabilities who have child care responsibilities. Employers are not required to provide employees with telework for a reason related to child care responsibilities, but they can consider such requests on a case-by-case basis. To avoid any potential claims of disparate treatment, employers should ensure that the individual who is handling employees' inquiries regarding child care addresses them in a consistent manner. Employees who cannot perform their jobs in their workplace because of child care responsibilities and cannot continue to telework due to the employer's policy may be entitled to other types of leave.

Conclusion

Although the EEOC has issued guidance, it is important to remember state legislation may be applicable to an employee's request to telework. Employers should reach out to employment counsel for help in assessing an employee's request for accommodation.

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COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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