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EEOC'S Updated COVID-19 Guidance Places Additional Restrictions on Employers

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For more than two years, employers have had to navigate a frequently changing landscape to ensure they complied with all of the laws relating to the COVID-19 pandemic. That landscape continues to change with two recent developments from the Equal Employment Opportunity Commission. On July 12, the EEOC updated its "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" guidance to address topics including testing employees for COVID-19, hiring, and required reasonable accommodation. On July 11, the EEOC settled a case involving an allegation that an employer had violated the Genetic Information Non-Discrimination Act by collecting employees' family members' COVID-19 test results.

COVID-19 Medical Examinations and Inquiries

According to the EEOC's updated guidance, employers are now able to test an employee for COVID-19 when evaluating his/her initial or continued presence in the workplace ***only*** if they can show such testing is job-related and consistent with business necessity. The EEOC has explained that possible considerations in assessing "business necessity" include the level of community transmission, the vaccination status of employees, the accuracy and speed of processing for different types of COVID-19 tests, the degree to which breakthrough infections are possible for vaccinated employees, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant(s), what types of contacts employees may have with others in the workplace or other locations in which they are required to work, and the potential impact on operations if an employee enters the workplace with COVID-19. The guidance makes clear that, going forward, employers must assess whether current pandemic circumstances and individual workplace circumstances justify testing of employees to prevent workplace transmission of COVID-19 at the particular time.

Hiring

According to the updated guidance, employers are only able to screen job applicants for symptoms of COVID-19 after making a conditional job offer, if they do so for all entering employees in the same type of job. Furthermore, if an employer screens everyone (i.e., applicants, employees, contractors, visitors) for COVID-19 before permitting entry to the workplace, an applicant in the pre-offer stage who needs to be in the workplace as part of the application process (e.g., for a job interview) may likewise be screened for COVID-19.

The new guidance also explains that an employer may legally withdraw a job offer because the applicant has tested positive for COVID-19, has symptoms of COVID-19, or has recently been exposed to someone with COVID-19 only if (1) the job requires an immediate start date, (2) CDC guidance recommends the person not be in proximity to others, and (3) the job requires such proximity to others at the workplace or elsewhere. However, even under these circumstances, the EEOC has suggested that employers may be able to adjust a start date or permit telework instead of withdrawing the job offer.

Importantly, an employer may not postpone a start date or withdraw a job offer because of the employer's concern that the individual is at increased risk from COVID-19 because he or she is older, is pregnant, or has an underlying medical condition.

PPE and Accommodation

The EEOC's new guidance explains that employers can generally require personal protective equipment (PPE) and other infection control practices compliant with OSHA guidance if they provide reasonable accommodation when necessary.

The guidance provides additional information on the accommodation and interactive process, including the process for an employee to request a reasonable accommodation because of a medical condition that puts him/her at a higher risk for severe illness from COVID-19. The guidance provides examples of potential reasonable accommodation to eliminate or reduce threats to employees who are high risk, such as PPE, HEPA filtration systems, or barriers. The EEOC also makes clear that although the initial delays in the interactive process created by the pandemic may no longer exist, it is still possible that an employer may face challenges that interfere with responding to a request for an accommodation expeditiously. In those circumstances, an employer must show specific pandemic-related circumstances justifying the delay in providing a reasonable accommodation.

Mandatory Vaccinations and Access to Records

The EEOC's guidance makes clear that employers may deny requests for exemptions under mandatory COVID-19 vaccination policies if the employee would pose a direct threat to the health or safety of himself/herself or others, based on various factors, including but not limited to the level of community spread at the time of the assessment, the type of work environment, the frequency and duration of direct interaction with others, and the effectiveness of potential accommodations.

The guidance also sets forth the types of employer representatives who may have access to confidential COVID-19 vaccination records, including those tasked with ensuring employees' compliance with a testing requirement or recording vaccination status.

Family Members' COVID-19 Test Results

In addition to its new guidance, the EEOC also recently settled a case involving allegations that an employer had violated GINA by collecting its employees' family members' COVID-19 test results. Among other things, GINA prohibits employers from requesting or obtaining medical documentation of employees' family members other than to justify family leaves. This case should serve as a reminder that, with certain exceptions, GINA prohibits employers from collecting their employees' family medical histories even when the information at issue is not typically considered genetic.

Complying with GINA can require employers to walk a fine line. Apart from the recently settled case, the EEOC's COVID-19 guidance advises that GINA prohibits employers from asking employees if they have family members who have COVID-19 or symptoms associated with COVID-19. Rather, employers may only ask employees if they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the virus.

Takeaways

The EEOC's new guidance and recent settlement make clear that the EEOC is now focused on increasing employee protections relating to COVID-19. Given this and as COVID-19 continues to impact the workplace and employees continue to return to work and their pre-pandemic activities, employers must assess each employee's situation carefully to determine whether their intended action complies with the changing requirements.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

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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