

EEOC Releases Guidance on Workplace Reasonable Accommodations in New COVID-19 World

By David M. Walsh

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In late-March and April 2020, the Equal Employment Opportunity Commission (EEOC) released guidance addressing various questions with answers concerning COVID-19 and related workplace disability-related issues under the Americans with Disabilities Act (ADA).

Most of the questions concern general employee rights and privacy and employer obligations during the current state of the COVID-19 pandemic. A few of the questions relate to the anticipated gradual return to the office of employees temporarily working remotely due to the pandemic as the crisis subsides.

Employees Seeking Continued Telework Arrangements after Public Health Measures No Longer Necessary

One question relates to the many employers doing their part by currently permitting telework for purposes of slowing or stopping the spread of COVID-19. The inquiry asks whether the employer automatically needs to grant telework as a reasonable accommodation to every employee *with a disability* who wishes to continue the work-from-home arrangement after the public health measures are no longer necessary.

The short and simple answer is no. The EEOC recognizes the employer will still be entitled to inquire about and understand the disability-related limitation that necessitates an accommodation. Absent such a limitation requiring telework, no continued work-from-home accommodation is required.

The EEOC notes that if there is a disability-related limitation that can be addressed with another form of reasonable accommodation at the workplace, the employer can choose that alternative over telework.

Employers are not required to excuse an employee from performing an essential function of the job, even if the employer temporarily excused performance of certain essential functions by permitting telework during the pandemic to slow or stop the spread of COVID-19.

A related question-and-answer is more nuanced. The inquiry assumes that, prior to the emergence of the COVID-19 pandemic, an employee with a disability requested telework as a reasonable accommodation and the employer denied the request due to concerns the employee would not be able to remotely perform the essential functions of the position. If the employee renews her request to telework (*i.e.*, continue to telework) as a reasonable accommodation after the COVID-19 crisis subsides and temporary telework ends, the employee's performance and ability to perform her job, including the essential functions, during the COVID-19 temporary telework situation, comes into play. The EEOC's answer notes that "the temporary telework experience could be relevant to considering the renewed request." Such period could have served as a "trial period that showed whether or not this employee with a disability could satisfactorily perform all the essential functions while working remotely and the employer should consider any new request in light of this information." In other words, the employer needs to consider, in light of new information concerning the employee's performance during the temporary telework period for COVID-19, whether the employer was incorrect in its initial conclusion that this particular employee would not be able to remotely perform the essential functions of the position.

Certain COVID-19-Related Reasonable Accommodations Employers Can

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Consider Upon Return of Teleworkers to Workplace

On April 17, 2020, the EEOC released updated guidance containing numerous additional questions about reasonable accommodation. One of these questions relates to jobs that may be performed only in the workplace and whether there are reasonable accommodations that could offer protection for employees who are at a higher risk of COVID-19 due to a preexisting disability.

The EEOC provides the following guidance: to the extent “not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and co-workers whenever feasible,” or other accommodations that reduce chances of exposure. Other possible accommodations noted by the EEOC include “temporary job restructuring of marginal jobs duties, temporary transfers to a different position, or modifying a work schedule or shift assignment” to help a disabled employee “perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.”

Interactive Dialogue Need Not Wait

Two questions relate to timing of reasonable accommodation discussions with employees who are currently teleworking, even where the accommodation relates to when the employee returns to work after the mandatory telework ends. The EEOC states the employer need not delay discussions until the employee is required to return, as the employer should be able to acquire all information it needs for a future decision to enable it to make certain arrangements for the accommodation in advance.

Takeaway

Considering the EEOC’s responses, even during a pandemic, the EEOC expects employers to consider their obligations under the ADA to engage in the interactive process and consider reasonable accommodations.

Please contact a Jackson Lewis attorney with any questions concerning these COVID-19 reasonable accommodation request issues.

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