

New EEOC COVID-19 Guidance Updates Accommodation Obligations and Warns Against Return-to-Work Age and Pregnancy Discrimination and Harassment of Workers of Asian Descent

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With regulators and lawmakers struggling to address the new wave of issues arising from employers reopening and bringing employees back to their workplaces, the U.S. Equal Employment Opportunity Commission (“EEOC” or “Commission”) has once again issued a series of [Frequently Asked Questions](#) (“FAQs”) addressing COVID-19-related return-to-work considerations.¹ The new FAQs offer further guidance on how to handle disability accommodation requests, address return-to-work issues involving older workers and pregnant employees, and reiterate an employer’s obligations with respect to preventing or correcting any harassment of employees of Chinese or other Asian national origin.

Guidance on Handling Reasonable Accommodation Requests

Many employers are concerned about how to deal with employees who fall into high-risk categories for COVID-19 as they recall employees to the workplace. In connection with recalls that include individuals falling within high-risk groups, the EEOC advises employers that, in advance of reopening, they may provide information to *all* employees about the process for requesting a disability-related accommodation “that they may need upon return to the workplace.” Specifically, the Commission recommends that such notification include:

- the Centers for Disease Control and Prevention (“CDC”) [list](#) of medical conditions that place certain individuals at higher risk of serious illness if they contract COVID-19;
- the identity, and contact information for, the individual(s) to whom the employee should direct his or her request (an employer may wish to designate specific contacts, depending on the nature of the accommodation requested, e.g., disability, religious belief, or pregnancy, and should make sure that the company

¹ Our blog posts on prior updates to the EEOC’s COVID-19-related guidance are [here](#), [here](#), and [here](#).

representative receiving such inquiries understands how to deal with them in a non-discriminatory manner); and

- a statement that “the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.”

Alternatively, the EEOC suggests that an employer may choose to make a more general inquiry, advising employees that it “is willing to consider [other kinds of] requests for accommodation or flexibilities on an individualized basis.” Though the FAQs are silent on this point, employers should be aware that, once they receive a request for accommodation or “flexibility,” regardless of whether the person refers to the request as one for an “accommodation,” they should first determine if the requested accommodation involves a protected basis for accommodation (such as a physical or mental disability or a pregnancy-related disability).²

Employers should approach this endeavor cautiously. If the accommodation is being requested due to a disability covered by the federal Americans with Disabilities Act (“ADA”), the employer must engage in the interactive process with the requesting employee to determine if a reasonable accommodation is available for the worker to perform the essential functions of his or her position that would not impose undue hardship on the employer’s operation of its business. Employers should also consider whether the requested accommodation may be covered under state or local laws, which may provide employees greater protections than are available under federal law.

The EEOC has further suggested that employers consider having “flexible” policies, which would allow for accommodations where they are not for a covered disability. An employer that allows for such “flexibilities” must ensure, however, that its policies and practices are applied consistently so as to avoid disparate treatment of a protected group under Title VII of the Civil Rights Act of 1964 (“Title VII”)—e.g., a disparity based on race, sex, national origin, etc. For instance, as the FAQs explain, an employer that allows employees to telework because their children’s schools are closed due to the pandemic may not favor female employees over male employees when applying such a policy, as doing so may be unlawful under Title VII if the practice is based on “a gender-based assumption about who may have caretaking responsibilities for children.”

Additionally, employers should consider whether an employee seeking an accommodation may have a caregiver leave entitlement under the federal [Families First Coronavirus Response Act](#) or the Family and Medical Leave Act, or other rights under a state or local leave or pandemic-related law, such as a sick time law.³

² As discussed below, some states and cities deem pregnancy, in and of itself, a basis for a required accommodation.

³ See, e.g., Colorado’s [guidance](#) on the rights of employees to accommodation, including leave, related to the pandemic. See also footnote #4 below on [guidance](#) from the Texas Workforce Commission.

Accommodations Based on Disability

The FAQs clarify that an employee is *not* entitled to an accommodation under federal law, i.e., the ADA, in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. As the EEOC explains, the ADA's prohibition on discrimination based on association with an individual with a disability "is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated." For the most part, state and local laws prohibiting discrimination based on familial or caregiver status also do not require accommodation for these reasons, but should be reviewed and considered.

The EEOC notes that, while the ADA does not require an employer to permit an employee to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure, an employer may choose to provide the accommodation. Again, however, employers are cautioned to make sure to treat employees consistently with respect to such requests and check whether such an obligation may exist under state or local law, particularly via legislation, a governor's executive order, or agency guidance concerning temporary protections related to the COVID-19 pandemic.⁴

Disability Accommodation and the Screening Process

The FAQs make clear that an employee who asks for an alternative method of screening due to a medical condition is requesting a reasonable accommodation. Accordingly, an employer must treat the request as it would any other ADA-protected request, i.e., it must engage in the interactive process to determine if the employee may be reasonably accommodated. The EEOC also suggests the following approach:

If the requested change is easy to provide and inexpensive, the employer might voluntarily choose to make it available to anyone who asks, without going through an interactive process. Alternatively, if the disability is not obvious or already known, an employer may ask the employee for information to establish that the condition is a [disability](#) and what specific limitations require an accommodation. If necessary, an employer also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.⁵

⁴ See, e.g., [guidance](#) from the Texas Workforce Commission instructing that an employee who refuses to return to work because he or she has a household member who is at high risk, including being 65 or older, may retain unemployment benefit eligibility.

⁵ Again, employers must check state and local law. For instance, in [New York](#), an employer may not ask for documentation if an employee (or customer) refuses to wear a [face covering](#) because the individual asserts that he or she cannot "medically tolerate" wearing a mask.

The FAQs further stress that employees have a right to reasonable accommodations for their sincerely held religious beliefs under Title VII. Thus, if an employee requests an alternative method of screening as a religious accommodation, the employer must consider whether a reasonable accommodation is available.

Accommodations Based on Age

Although neither the ADA nor the Age Discrimination in Employment Act (“ADEA”) entitles employees to a reasonable accommodation due to age, the EEOC states that providing an accommodation on that basis is “not prohibited” by the ADEA, and is “consistent with the ADEA, the ADA, and [CDC guidance](#). In fact, the Commission goes further and states that employers may lawfully accommodate an older person “even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.”⁶ Here, too, employers must tread carefully and consider whether doing so would violate state or local laws that may prohibit disparate treatment based on age (in particular, where it results in treating older workers better than younger workers), and whether they have an obligation under state or local law to provide a pandemic-related accommodation to an older person.⁷

Accommodations Based on Pregnancy

As the FAQs reiterate, a pregnant employee may have accommodation rights under either or both the ADA and Title VII. Under the ADA, a pregnancy-related medical condition may be a protected disability, even though pregnancy itself is not an ADA disability.⁸ The FAQs further state the following:

Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work.

Discrimination: Refusal to Allow Actual or Perceived “Higher Risk” Individuals to Return to the Workplace

The FAQs make unequivocally clear that the ADEA prohibits “a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or

⁶ Employers should also consider whether they may be vulnerable to liability for such actions under state or local law, as the ban on age discrimination in many jurisdictions, such as [New York City](#), protects employees of any age.

⁷ See, e.g., the [proclamation](#) issued by the governor of Washington providing special, pandemic-related protections for older workers (65 years of age or older) and “[p]eople of all ages with underlying medical conditions, particularly if not well controlled.”

⁸ As noted earlier, be aware of state and local law. For example, in [New York City](#), employees can request accommodations from employers based on pregnancy, childbirth, or a related medical condition, “regardless of whether their medical condition amounts to a disability.”

older, even if the employer is acting for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.”

Similarly, an employer may not exclude an employee from the workplace involuntarily due to pregnancy. Again, even if the employer is “motivated by benevolent concern,” it may not “single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.”

Pandemic-Related Harassment

The FAQs also reiterate that employers cannot tolerate harassment of employees “who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.” As the Commission emphasizes, such harassment can occur while employees are working remotely or on leave, as well as in the workplace, and can take place through electronic communication tools, such as email and social media.

The EEOC advises employers to take the following preventive and corrective actions concerning harassment:

- Understand how to recognize any kind of harassment, including that related to the COVID-19 pandemic.
- Instruct managers on their legal obligations; to be alert to “demeaning, derogatory, or hostile remarks directed to employees”; and “to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.”
- Be aware that the perpetrator of harassment can be a contractor, customer, client, or visitor, as well as a supervisor or co-employee.
- Consider sending a “reminder” to all workers, including contractors, reiterating the legal prohibitions on harassment, the company’s policy forbidding harassment and the potential disciplinary repercussions for engaging in such misconduct, and the procedures available “for anyone who experiences or witnesses workplace harassment to report it to management.”

What Employers Should Do Now

- Understand your obligations under all applicable anti-discrimination and accommodation laws, including federal, state, and local laws, regulations, and agency guidance, and ensure that all staff is aware of the importance and how-to’s of compliance, regardless of whether they are working on site or remotely.
- Determine whether to announce to employees the process for seeking accommodations; if you decide to do so, prepare any announcement in line with applicable legal requirements.

- Ensure that all managers and other individuals who may receive inquiries regarding accommodations understand the legal requirements and how to handle such requests (including whom to refer the requesting individuals to).
- If you decide to adopt “flexible” policies providing accommodations for employees where no legal mandates exist, make sure that those policies are fairly and consistently applied, so that they do not result in disparate treatment of employees in a particular protected group.
- Stress to all employees the importance of complying with the law and company policy on matters of discrimination, harassment, and accommodation, and clearly communicate any new policies to all employees.
- Train managers and human resources staff on reasonable accommodation requests and how to consistently implement any new policies or practices.

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