Expert Analysis

Employer Takeaways From EEOC Virus Screening Guidance

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Law360 (March 31, 2020, 4:12 PM EDT) -- The governor of Ohio recently made national headlines by telling employers across the state to check employees' temperatures every day before work. Whenever employers conduct health screenings or otherwise make decisions based on their employees' health, the Americans with Disabilities Act becomes a key consideration.

The ADA regulates employer-mandated medical examinations, the medical questions employers are allowed to ask employees, and of course, the provision of reasonable accommodations to disabled individuals, including during a pandemic.

During the 2009 H1N1 swine flu pandemic, the U.S. Equal Employment Opportunity Commission published a document called "Pandemic Preparedness in the Workplace and the Americans With Disabilities Act."[1] Having faded into relative obscurity in the intervening years, the EEOC's guidance once again became relevant when COVID-19 was named a global pandemic.

Since that time, employment attorneys have referenced the 2009 guidance and wrestled with its implications for 2020. Last week, the EEOC updated its H1N1 guidance to clarify exactly how the principles apply today. The EEOC also updated a separate guidance document called "What You Should Know About the ADA, the Rehabilitation Act, and COVID-19"[2] and released a supplemental webinar titled "Ask the EEOC."[3]

Perhaps not surprisingly, the Ohio governor's request aligns with the EEOC's compliance guidelines, which help employers navigate ADA considerations while keeping COVID-19 out of the workplace. While medical examinations are normally prohibited under the ADA, the EEOC explains that examinations are appropriate when an employee would pose a direct threat to others by transmitting COVID-19.

Taken together, the EEOC's updated guidance materials provide the following key takeaways for employers.

Employers should not ask questions related to disabilities, such as whether an employee has a compromised immune system or a medical condition that makes the employee more susceptible to COVID-19.

Employers can ask questions about symptoms of COVID-19 to ensure that sick employees stay home. Likewise, when employees call in sick without giving details, employers can ask about symptoms of COVID-19 in order to protect the rest of the workforce. However, employers should not ask these questions of employees who are already working remotely and have not been interacting with customers or coworkers.

Employers can check temperatures and conduct COVID-19 screenings of current employees, and of new employees but only after making a conditional job offer. If an employer has a reasonable belief based on objective evidence that a particular employee might have COVID-19 (due to a hacking cough, for example), the employer may conduct a health screening only of that one employee, rather than the entire workforce.

If an employee refuses to answer COVID-19 screening questions or refuses a temperature check, then the employer may bar the employee from the workplace. The EEOC encourages employers to assure employees that their medical information will remain confidential, which may make employees more likely to comply with employer requests.

Any records resulting from medical screenings should be maintained in a separate medical file (i.e., not as part of an employee's personnel file) and treated as a confidential medical record. If a manager receives medical information while teleworking, and thus cannot follow the employer's usual confidentiality protocols, the medical information should be safeguarded to the greatest extent possible until it can be properly filed when the manager returns to the workplace. This may mean documenting medical information using initials or ensuring that laptops and devices cannot be accessed by others in the household.

Likewise, employers who send an employee home should keep the decision confidential. Employers can tell other employees that they were exposed to a coworker with COVID-19, and then send home all employees who worked in close proximity to that person, but employers should not identify the coworker in question.

That person's identity should only be shared with those who have a need to know, such as a supervisor who interviews the coworker about who might have been exposed to them in the workplace. Likewise, if an employee is teleworking due to having COVID-19, the employer can share the fact that the employee is teleworking but should not share the reason the employee is teleworking.

Employers can delay the start date of an employee who has symptoms of COVID-19. If an employer needs an employee to start working immediately, then the employer can withdraw a job offer to an employee with COVID-19.

Employers can request that employees who recently traveled to affected areas or were exposed to a person with symptoms of COVID-19 stay out of work until a certain number of days passes without symptoms. Employers should not specifically ask employees if they have a family member with COVID-19, which would be prohibited by the Genetic Information Nondiscrimination Act. Employers can ask, more generally, if employees have been exposed to any person with symptoms of COVID-19.

Employers can require a doctor's clearance prior to allowing an employee to return to work. Note, however, that the Centers for Disease Control and Prevention tells employers not to require a doctor's note to validate symptoms, because that discourages employees from staying home.

Employers can require employees to adopt infection-control practices in the workplace, such as prohibiting handshakes and requiring frequent hand-washing, wearing masks, maintaining six feet of distance from other employees, and related measures.

For the moment, much of this guidance applies to essential businesses, such as supermarkets and transportation companies, which are still open despite quarantines and other social distancing measures. Many nonessential businesses, which are currently closed, aspire to reopen as soon as possible.

While the exact timeline is still unclear, many businesses will likely reopen while COVID-19 is more controlled than it is today but still a risk, especially for employees with compromised immune

systems and other medical conditions (such as lung disease and heart issues).

Since employers cannot ask questions related to disabilities, how can they determine which employees may be unavailable when they reopen? The EEOC explains that an inquiry is not disability-related if it identifies nonmedical reasons for absence on the same footing with medical reasons.

So, for example, an employer is permitted to ask a survey question along the following lines: In the event our business reopens in the near future, would you be unable to come to work for a reason such as your child's day care center being closed, public transportation being sporadic, other dependents needing care, or having a compromised immune system or other health condition?

In this way, employers can determine which staff will be unavailable without running afoul of the ADA.

Depending on how early a particular business reopens, certain vulnerable employees might need to continue working from home for some period of time. Of course, employers are not absolved of their obligations to provide reasonable accommodations during a pandemic.

The EEOC observes that the rapid spread of COVID-19 has increased the number of requests for reasonable accommodations. This number will continue to increase if businesses reopen while the virus is not fully contained.

If an employer's usual reasonable accommodation processes are delayed due the volume of inquiries, the EEOC encourages employers to implement temporary solutions that enable employees to keep working while the discussion and potential provision of reasonable accommodations is pending. The EEOC's webinar[4] provides extensive details on this topic.

Reflecting the general uncertainty surrounding current events, the EEOC is still unsure whether COVID-19 is a disability under the ADA. As the EEOC observes, our knowledge of COVID-19's spread and containment changes day by day and its status as a disability will become clearer as time goes on.

As employers and their attorneys have seen, federal and state laws and regulations are changing equally fast. For now, while much of the country is on pause, employers should watch the changing landscape closely.

In the coming weeks and months, and especially as businesses reopen, states are expected to implement many new safety protocols. Perhaps a number will even follow Ohio's lead by beginning each workday with a temperature check.

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[1] https://www.eeoc.gov/facts/pandemic_flu.html.

[2] https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?renderforprint=1.

[3] https://www.eeoc.gov/eeoc/newsroom/release/3-27-20a.cfm.

[4] https://www.eeoc.gov/eeoc/newsroom/release/3-27-20a.cfm.

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