Limiting Liability:

Handling Accommodation Requests Related to COVID-19

By Julie A. Moore, Bowles Rice

As COVID-19 continues to spread, employers continue to grapple with navigating employment law issues related to the virus. In addition to administrating the new leave requirements imposed by the Families First Coronavirus Response Act, many employers are faced with tackling challenging employment issues under existing laws, including the Americans with Disabilities Act (ADA) and related state laws like the West Virginia Human Rights Act — both of which impose affirmative obligations on employers when it comes to the needs of employees with disabilities.

Many accommodation requests have arisen based upon guidance published by the Centers for Disease Control and Prevention (CDC), declaring that individuals with certain underlying medical conditions are at increased risk for severe illness from COVID-19. According to the CDC, individuals with the following conditions are at increased risk: cancer; chronic kidney disease; chronic obstructive pulmonary disease; immunocompromised state from solid organ transplant; obesity (i.e., BMI of 30+); serious heart conditions, such as heart failure, coronary artery disease or cardiomyopathies; sickle cell disease; and Type 2 diabetes. Additionally, people with the following conditions might be at increased risk: moderate-to-severe asthma; cerebrovascular disease; cystic fibrosis; hypertension; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, or use of corticosteroids or other immune-weakening medicines; neurologic conditions, such as dementia; liver disease; pregnancy; pulmonary fibrosis; a blood disorder called thalassemia; and Type 1 diabetes.

Based on the fact that many of these health conditions are likely to constitute disabilities under the ADA, employers see an uptick in accommodation requests from employees wishing to lessen or eliminate their possible exposure to the virus. This recent trend and the new application of the ADA prompted the Equal Employment Opportunity Commission (EEOC) to issue guidance to assist employers. Fortunately, such guidance provides confirmation that many of the basic ground rules about the ADA that we already know and have applied to workplaces for years still apply, notwithstanding the fact that we are in the midst of a pandemic.

First, it remains true that an employer's accommodation obligation is triggered by an employee's request. Accordingly, employers should not assume that employees with known health conditions wish to receive an accommodation and, certainly, should not endeavor to ban employees from the workplace based merely on the fact that they have a health condition that places them at higher risk. Indeed, the EEOC's guidance cautions that the ADA does not allow employers to automatically exclude an employee from the workplace solely because the employee has a disability that the CDC identifies as potentially placing him at higher risk for severe illness if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a direct threat to his

health that cannot be eliminated or reduced by reasonable accommodation, which involves an individualized assessment based upon objective facts.

Second, if an employee requests an accommodation that is premised upon a representation that he has one of the medical conditions recognized by the CDC as placing him at higher risk, employers should know that they still have the ability to seek information to evaluate the request. In other words, employers are permitted to ask questions of the employee and may require medical documentation from the employee's physician to evaluate whether he has a disability.

Similarly, employers are still permitted to engage in the interactive process to evaluate the employee's accommodation request. The EEOC's guidance instructs that, as always, an employer is allowed to ask questions of an employee about her disability-related limitations and the nature of her accommodation needs. Further, employers may require that supporting medical documentation be provided to assist with determining whether an employee's disability necessitates an accommodation and what types of accommodation may be needed. However, the EEOC implores employers to be mindful that employees may face difficulty obtaining medical documentation from their health care provider in a timely fashion due to challenges caused by the virus and the strain it has placed on the health care system. Accordingly, the EEOC encourages employers to consider foregoing, modifying or shortening the interactive process as appropriate or proceeding with implementing accommodations on an interim or trial basis, with an end date, while awaiting receipt of medical documentation.

When it comes to granting accommodations, again, many of the familiar, basic rules still apply. It remains true that employers are not required to eliminate essential functions as an accommodation. Elimination of essential job functions is not regarded as being reasonable, which is the applicable standard. Still, some employers are voluntarily electing to temporarily relieve employees of essential functions to accommodate those who are at heightened risk for COVID-19. Should an employer choose to temporarily remove an employee's essential functions during the pandemic, it is recommended that this fact be clearly documented within any accommodation approval letter issued to the employee. Doing so will help to defend against subsequent disputes about whether the removed function is, indeed, regarded by the employer as being essential, as opposed to merely marginal.

Likewise, it remains true that employers are not necessarily required to grant employees their desired accommodation of choice if other effective accommodations exist. Generally, effectiveness, and not the employee's personal preference, is the relevant consideration in selecting a reasonable accommodation. In the context of COVID-19, application of this principle has arisen, perhaps, most frequently, in connection with requests to telework. Generally, employees are not required to permit telework if other effective accommodations exist within the workplace, and so long as the approval of telework is not discriminatorily applied.

Overall, the EEOC encourages employers to be flexible and think outside the box when it comes to granting accommodations related to COVID-19, and to consider approving accommodations on a temporary basis, anticipating that the pandemic will someday come to an end, and the world will return to the normal state we previously knew.

In sum, the importance of properly handling accommodation requests related to COVID-19 cannot be overstated. Under federal and state law, employees may file a claim for failure to accommodate, which can be challenging and costly to defend. Accordingly, employers are encouraged to review their accommodation protocol to ensure that employees know how to make requests; that requests do not fall upon deaf ears or slip through the cracks; that requests are timely and properly vetted by human resources; and that appropriate documentation is generated along the way. ■

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