

HENDERSON BROTHERS UPDATE

EEOC Issues Updated COVID-9 Technical Assistance Publication

Date: June 12, 2020

The U.S. Equal Employment Opportunity Commission (EEOC) has released an updated technical assistance publication that addresses questions that have arose from the Federal Equal Employment Opportunity Laws related to COVID-19.

The continually updated EEOC publication titled, [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,”](#) provides employers with strategies that they can adopt as they prepare for employees to return to the workplace. The Q&As cover numerous COVID-19 related issues, including, disability, confidentiality, hiring and onboarding, reasonable accommodations, etc.

Here are a few of the new Q&As just posted:

G.6. As a best practice, and in advance of having some or all employees return to the workplace, are there ways for an employer to invite employees to request flexibility in work arrangements? (6/11/20)

Yes. The ADA and the Rehabilitation Act permit employers to make information available in advance to all employees about who to contact – if they wish – to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, the employer may begin the [interactive process](#). An employer may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request – for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and the May 29, 2020 [CDC guidance](#) that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness.

Regardless of the approach, however, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.



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G.7. What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition? (6/11/20)

This is a request for reasonable accommodation, and an employer should proceed as it would for any other request for accommodation under the ADA or the Rehabilitation Act. 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. Similarly, if an employee requested an alternative method of screening as a religious accommodation, the employer should determine if accommodation is available under [Title VII](#).

H.1. The [CDC has explained](#) that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus and therefore has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under the federal employment discrimination laws? (6/11/20)

The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request [reasonable accommodation for their disability](#) as opposed to their age.

Lastly, there is information within the publication that addresses steps employers may take to stop harassment towards employees who are or are perceived as being Chinese or other Asian descent.

The EEOC has supplied [resources on its website](#) in response to inquiries from the public in regards to the pandemic in an employment context. The EEOC will provide updates and assistance to the public as developments come to light.

Refer to HBI's Coronavirus Resource Center on our website for additional COVID-19 articles, guidance, checklists, and sample policies.

Please note that the information contained in this document is designed to provide authoritative and accurate information, in regard to the subject matter covered. However, it is not provided as legal advice and no representation is made as to the sufficiency for your specific company's needs. Please consult with counsel before use.

