

Employer Best Practices From EEOC's New Virus Q&A

By **Sharon Masling and Chai Feldblum** (June 16, 2020, 5:27 PM EDT)

On June 11, the U.S. Equal Employment Opportunity Commission issued its most recent round of Q&As^[1] offering guidance to employers on COVID-19, the Americans with Disabilities Act and other equal employment opportunity laws.

Among other things, the EEOC addressed issues regarding older workers, pregnant workers, harassment of Asian workers and accommodations.

Key Takeaways for Employers

Perhaps most importantly, the EEOC addressed questions regarding the rights of employees over the age of 65.

First, the EEOC made clear that an employer may not involuntarily exclude an employee from the workplace simply because the employee is over the age of 65 — even though the Centers for Disease Control and Prevention has said that such individuals are at greater risk for severe illness if they contract COVID-19, and even if the motivating rationale is to keep the employee safe.

The EEOC explained that excluding people from the workplace on the basis of age violates the Age Discrimination in Employment Act, or ADEA. And unlike the ADA, which might allow an employer to exclude an employee with a disability from the workplace after the employer engages in an individualized assessment to determine if the employee poses a direct threat to him- or herself, the ADEA provides no such affirmative defense to an employer.

In addition, the EEOC stated that an employer is not legally required to provide an accommodation to a person over the age of 65, even though that person may be at higher risk of severe illness. Unlike the ADA, the ADEA does not have an explicit reasonable accommodation requirement.

However, the EEOC explained that the ADEA would not preclude an employer from granting alternative workplace arrangements to employees over the age of 65, even if the employer did not provide such arrangements to employees between the ages of 40 and 65.

That is because the ADEA not only permits employers to favor employees over 40, as compared to those



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under 40, but an employer may also treat employees in the upper age levels of the protected range — 40 and above — better than those in the lower age levels.

The EEOC also provided guidance on the rights of pregnant workers. It explained that an employer may not exclude an employee from the workplace involuntarily due to pregnancy, even if the employer wants to do so in order to protect the employee, as that would violate Title VII of the Civil Rights Act.

The EEOC further explained that an employer is required to provide reasonable accommodations to pregnant women, both under the Pregnancy Discrimination Act, if the employer provides accommodations to individuals "similar in their ability or inability to work," and under the ADA, if the employee has a pregnancy-related medical condition.

The EEOC also explained that:

- Employers are not legally required to provide accommodations to employees with family members who are at higher risk of severe illness if they contract COVID-19, but nothing precludes employers from providing telework or other alternative work arrangements to such employees if employers would like to do so.
- As more employees return to the workplace, employers should be cognizant of potential harassment against employees of Asian — and in particular, Chinese — descent. Managers should be trained on how to recognize harassment and address it if it occurs. This includes electronic harassment by employees who are working from home.
- Employers are required to treat requests for alternative temperature and symptom screening procedures as requests for reasonable accommodations and should provide alternatives to such procedures unless doing so would pose an undue hardship.
- When providing accommodations to caregivers, employers should make sure they do not treat female caregivers better than male caregivers, as doing so could violate Title VII.
- While the EEOC did not opine directly on this issue, employers should also not discriminate against female employees when deciding who to bring back to the workplace, based on the assumption that female employees are more likely than male employees to have caregiving responsibilities.

Best Practices for Employee Accommodations and Alternative Workplace Arrangements

Given the EEOC guidance, there are a number of steps employers can take to address employee requests for accommodations and alternative workplace arrangements.

An employer must provide reasonable accommodations to people who need them because of disability, pregnancy or religion unless providing the accommodation would pose an undue hardship.

For example, an employer should allow an employee at higher risk of severe illness if they contract COVID-19, either because of an underlying health risk or pregnancy, to telework if the job can be performed from home. Similarly, an employer should provide a temperature screener of the same gender if an employee's religion necessitates that accommodation and doing so would not pose an undue hardship for the employer.

There are other classes of people who also might need alternative workplace arrangements, even if an

employer is not legally required to provide such arrangements.

We prefer using the term "alternative workplace arrangements" to describe changes made for classes of such individuals, to distinguish such arrangements from "reasonable accommodations" that are legally required to be provided to other classes of employees. This includes people over the age of 65, people who live with people who are at higher risk of severe illness if they contract COVID-19, and people with child care and/or elder care responsibilities.

For these classes of employees, employers should decide what their policies are going to be, and they should be sure to apply their policies consistently. Employers can choose to provide alternative workplace arrangements for anyone who needs them, or they can, for example, decide to provide alternative workplace arrangements only for those who are at high risk because they are over the age of 65, or only for those who live with others who are at high risk.

It is important that these policies be communicated to anyone with supervisory or decision-making authority, such as managers or human resources personnel, so that the requests are handled properly and in a consistent fashion.

Finally, information about these policies should be shared with all employees, including who to contact to request an accommodation/alternative arrangement and what documentation will be required. Employers should consider notifying employees as part of the return-to-work process of the availability of reasonable accommodations or alternative work arrangements, even if a specific return date has not yet been announced.

Conclusion

None of what the EEOC has said is new. But employers are entering a brave new world as they begin to bring their employees back to work. The EEOC's guidance provides helpful direction on how to apply existing law to new circumstances. Such guidance benefits both employers and employees.

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[1] <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.