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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

EEOC Coronavirus Guidance No Silver Bullet For ADA Risks

By **Vin Gurrieri**

Law360 (April 3, 2020, 10:16 PM EDT) -- Although the U.S. Equal Employment Opportunity Commission recently issued guidance that gives employers leeway to respond aggressively to the novel coronavirus without violating the Americans with Disabilities Act, businesses will still have to tread carefully to avoid disability bias claims, experts say.

In the employment context, the ADA protects workers from disability bias and limits employers' ability to, among other things, ask medical questions of workers or mandate that they take medical examinations. However, the law includes certain exceptions for when an employee poses a "direct threat" to the health or safety of others.

In several pieces of guidance issued over the past few weeks, the EEOC answered numerous questions about how employers can respond to COVID-19, the disease caused by the novel coronavirus. Those included questions like whether businesses can take workers' temperatures (yes) and whether employers can screen new hires for COVID-19 symptoms (also yes).

Former longtime EEOC Commissioner Chai Feldblum, who now practices at Morgan Lewis & Bockius LLP, said the EEOC's guidance gives businesses a good road map for navigating through the COVID-19 pandemic.

"I think the balance they should strike is precisely what the EEOC told them they should do," Feldblum said. "Before the EEOC came out with this guidance, we were already recommending to employers what we thought the balance should be, but it was incredibly helpful for the EEOC to put out that guidance [and] hold their webinar. So I don't think employers have to figure it out alone."

But even though the EEOC's guidance gives employers some space to impose safety measures that might run afoul of the ADA under normal circumstances, the realities of the pandemic as well as the swelling number of workers being laid off or furloughed means that businesses aren't completely inoculated from potential ADA violations.

"I would expect an uptick in the filing of ADA cases just as a result of the huge disruption of workforces across the United States and the sheer volume of people being terminated," said Donald Schroeder, a partner at Foley & Lardner LLP.

"If you're going to do a reduction in force, the disparate impact analysis that you typically do should apply equally in this context," he added. "You want to make sure that everybody that is being let go is

for a legitimate, nondiscriminatory reason and that you've done a disparate impact analysis as well if it's a larger group."

EEOC Weighs In

Although the pathogen that causes COVID-19 was newly introduced into the human population in central China just late last year, pandemics are nothing new.

In 2009, the EEOC issued guidance in response to the H1N1, or swine flu, virus that detailed how employers can prepare for and respond to a pandemic while still remaining in compliance with the ADA. The anti-discrimination watchdog updated that guidance on March 21 to account for COVID-19, saying the disease falls under the ADA's "direct threat" exception.

The guidance also offered numerous scenarios of situations that could arise and what employers are allowed to do.

For example, the EEOC said that employers can send home workers who have COVID-19 or are symptomatic, can ask workers who report feeling sick questions about their symptoms to determine if they might have the disease, and can take employees' temperatures.

The guidance also said that businesses that are hiring can screen job applicants for COVID-19 symptoms as long as all applicants for the position are screened. Employers can also pull a job offer if the successful candidate shows COVID-19 symptoms and can't safely enter the workplace, according to the guidance.

The EEOC supplemented its guidance with an online webinar on March 27 in which three of its top legal officers tackled a broader range of tricky workplace scenarios for COVID-19 than what was covered in the guidance documents.

"EEOC is really the outlier in the sense that they had this guidance on the books for a long time and basically were able to dust it off for those dealing with this pandemic," Schroeder said.

Temperature Checks

One of the key issues that has emerged amid COVID-19's spread — and the question that led off the EEOC's online Q&A — is whether businesses are allowed to test employees for fevers before they enter a worksite to guard against those who have the disease coming into contact with people who aren't infected.

In answering in the affirmative, the EEOC said that employers have the ability to conduct that sort of medical test and are allowed to report any confirmed cases they are aware of to public health officials.

While Schroeder said that there are normally limits under the ADA for conducting a medical examination, the "relaxed interpretation that the EEOC has given for pandemic-related matters is much more liberal."

For essential businesses that remain open and those that will start coming back when quarantine measures are lifted, Schroeder said it is "pretty likely" that some employers will want to take employees'

temperatures, while others might be more comfortable simply questioning employees about whether they have had COVID-19 symptoms or interacted with people who were infected.

“Generally speaking, that’d be a medical exam. You wouldn’t be able to do it. But given the guidance as it currently exists … you certainly ask a wide range of questions well beyond what you would typically do, and I don’t think there are going to be any issues with respect to asking those questions,” he said. “I think it’s going to be a given going forward that employers are going to have leeway with respect to what questions they ask of their people and certainly of anybody coming on-site.”

However, Schroeder cautioned that if businesses do conduct fever screens of workers, that assignment should fall to someone “well-versed in how to do it” and not be dumped on whichever individuals from human resources happen to be available. Otherwise, employers risk an infection or the creation of the sort of unsafe working conditions that the test is intended to prevent.

“It really should be somebody that has the wherewithal and knowledge of what exactly is required from [the standpoint] of personal protective equipment,” he said. “I think that’s really in many respects the starting place if they’re going to go down that road.”

Privacy Worries

In regard to temperature checks, the EEOC noted in its guidance material that employees who refuse to undergo a temperature screen or answer COVID-19 related questions can be barred from the workplace. The agency noted, however, that employees often are reluctant to provide medical information because they worry that employers will share it with others throughout the workplace.

While the EEOC said in its webinar that the ADA prohibits any broad disclosures of medical information like body temperature or symptoms, a limited number of key officials within a company can be brought into the loop when a worker tests positive for COVID-19 and can potentially be told of the worker’s identity on a need-to-know basis.

Laura Lawless, a partner at Squire Patton Boggs LLP, said the issue of worker privacy is “one of the issues that we’re going to be wrestling with for some time to come” and is one that carries some legal risk for employers currently operating under more lax rules.

“We have loosened a lot of ordinary expectations around employee privacy — medical testing, asking questions about symptoms — where we tend to be very vigilant about not delving into that,” Lawless said. “In an abundance of caution, we may be relaxing it too far by sharing information about diagnosis and symptoms, and is that going to come back and hurt employers in the end?”

While Lawless said that employers have an urgent need to protect workers, customers and the community by letting people know about exposure or suspected infections, she warned that they have to be careful not to overstep disclosure bounds.

“Is that overreaction? Are you actually doing more than is necessary to protect people … or are those employees whose information was divulged going to have a claim in the future?” Lawless said. “We want to strike the right balance — and where that is something we’re still struggling with because this is unprecedented — between giving out enough information to put people on alert when the circumstances warrant it … versus something that’s very attenuated and that reveals more information than is necessary.”

“Unless there’s something that particularly warrants more information, take a moment, take a breath, pause for a second to see if maybe you’re going too far in revealing information about employees,” Lawless said.

Open Door for Bias

Another potential issue that arises out of the EEOC’s guidance is whether it does enough to protect workers who have COVID-19 from discrimination.

Josh Van Kampen of Van Kampen Law PC, a plaintiffs-side firm located in North Carolina, said he believes the EEOC’s guidance falls short when it comes to actually protecting workers if they are subjected to disability bias related to COVID-19 or ensuring that businesses accommodate workers who have the disease as the ADA normally requires for people with disabilities.

“When I was reading the new guidance, I kept on looking for the part where it would say that COVID-19 is a disability, or that employers have obligations to provide reasonable accommodations to people with it. And the guidance didn’t go there.” Van Kampen said. “Instead, the guidance seemed to be focused on emphasizing everything the ADA would not prohibit with employers’ handling this pandemic, which is really concerning. I didn’t read the guidance and see anything really good or useful for workers’ rights.”

In the webinar, the EEOC said the virus is still “very new” and “there is much that is still unknown” about it. “Therefore, it is unclear at this time whether COVID-19 is or could be a disability under the ADA,” the EEOC said, adding that employers can still ban workers who have the disease from the workplace for now regardless of the answer to that question.

Bur Van Kampen noted that Congress has recently passed other forms of legislation, including the Families First Coronavirus Response Act, to help workers weather the economic storm brought about by the virus.

That law, which took effect on April 1 and lasts through the end of the year, makes emergency paid sick leave available to workers affected by COVID-19 in various ways and expands the Family and Medical Leave Act to give workers long-term paid time off at partial pay if they can't work because their child's school has closed.

Van Kampen suggested that Congress similarly consider amending the ADA so that it says people who have COVID-19 qualify as having a disability.

“Even if Congress sunsetted it like they did for the [Families First Act] through the end of the year, at least then there would be clarity about the ADA applying and it protecting people,” Van Kampen said. “But still true to form with this administration, the guidance that came out was much more focused on explaining how the ADA was not an impediment to employers instead of a law that can protect workers in this pandemic.”

--Editing by Jill Coffey and Emily Kokoll.
