Old Rules, "New Normal"

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Most employers have settled into maintaining a virtual workforce. It's now time to begin to plan for a tentative return to the workplace. Whether virtual or in returning to the office, it is important to remember that the laws that govern "the workplace" -- discrimination, disability, and other laws -- remain in full force and effect. Employers must be mindful of how those rules apply to the unique and unprecedented dynamics that will continue to affect the workplace for the foreseeable future.

Discrimination And Disability Laws

Discrimination and disability laws remain in full effect and employers must keep them in mind when asking employees to work remotely, or potentially to return to the workplace amid heightened safety concerns. For purposes of working remotely or choosing which employees will physically return to the facility first, employers may not treat employees differently on the basis of any protected characteristic. For example, asking only those over a certain age or those with underlying health conditions to continue to work from home, "for their own good," will not be permissible.

Employers also should ensure that employees receive any necessary reasonable accommodations in accordance with the Americans with Disabilities Act and, in New Jersey, the New Jersey Law Against Discrimination, such as ensuring that employees who have a disability receive special equipment or technology in order to enable them to work from home. Employers should also re-evaluate the employee's ongoing technology need upon the employee's return to the facility.

Currently, being diagnosed with COVID-19 does not place one in a protected category for purposes of disability or other laws. At the same time, employers should protect against employees engaging in any form of stigma against a person who either has, or is suspected of having, COVID-19. Employers should also be mindful that aspects of the condition, however, may qualify an employee for treatment as a disabled person.

As to the other members of the workforce, the EEOC had advised that federal law does not prohibit employers from taking certain precautions to protect the workplace. Employers may thus lawfully take the following actions: (1) measure an employee's body temperature, (2) question employees about symptoms, (3) require employees to leave the workplace and stay home if they have symptoms, and (4) require a doctor's note showing fitness for duty before the employee returns to work. Employers should know that an employee's temperature and other health information must be kept confidential. Employers who intend to implement any of the above workplace safety measures should provide advance notice to employees through early policy development.

Workplace dynamics/Sexual harassment

Employees generally will be more difficult to monitor when they are teleworking and so employers should take extra steps to ensure employees are following policies, such as by holding regular teleconferences, reminding employees of company policies, and encouraging supervisors regularly to check in with workers. Particularly with regard to sexual harassment,

remote working blurs the line between the workplace and home, and can sometimes cause unprofessional behavior such as employees not being fully or appropriately dressed during virtual meetings or discussing more intimate details about their lives in their professional communications. It is important for employers to know that sexual harassment can take place off work premises and during non-work hours. Parrish v. Sollecito, 249 F. Supp. 2d 342 (S.D.N.Y. 2003) (sexual harassment alleged to have occurred at funeral of employee's family member); Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995) (sexual harassment alleged to have occurred at dinner party). It also can occur through text messaging and social media. https://www.eeoc.gov/eeoc/newsroom/release/8-30-12.cfm. Accordingly, employers should require employees to maintain professional attire and behavior during remote work functions such as video conferences and virtual happy hours, and remind employees that sexual harassment can extend beyond the physical workplace.

Return to Work

Even after the employer's workforce returns, employers should continue to adhere to federal, state, and local guidance regarding appropriate protective measures. An employer may require employees to wear protective gear (for example, masks and gloves) and observe infection control practices (for example, regular hand washing and social distancing protocols). However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves for employees with latex allergies, modified or "clear" face masks to aid deaf or hard of hearing employees who rely on lip reading, or modified gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII of the Civil Rights Act and the New Jersey Law Against Discrimination (e.g., modified equipment due to religious apparel), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business. https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

Takeaway

In sum, employers should continue to be vigilant in observing applicable laws and policies, even while most or all of their workforce continues to work from home. Employers should also be proactive in developing, now, new workplace protocols and polices that will ensure general workforce safety and by identifying the new accommodations needs of individual employees.