Returning to Work Amid COVID-19: What Employers Should Know About Assessing And Accommodating At-Risk Employees

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By now, employers are well-informed that employees with underlying health conditions are at greater risk for developing serious medical complications if they contract COVID-19, and that these employees' medical conditions might warrant accommodations when returning to work under the Americans With Disabilities Act (ADA) and state anti-discrimination laws. Employers need to be prepared when their doors re-open to accommodate these employees and implement policy to safeguard their operations from potential lawsuits.

The Centers for Disease Control and Prevention has identified the following underlying medical conditions that place an employee in the at-risk category: (1) age (65 and over; (2) severe obesity; (3) asthma; (4) heart conditions; (5) diabetes; (6) kidney or liver disease; and (7) an immunocompromised condition caused by a variety of factors, including cancer treatment, smoking, and certain immune weakening drug therapies and medical conditions. The broad scope of identified underlying medical conditions means most employers will face the dilemma of handling at-risk employees returning to work as businesses reopen and resume operations.

In May, the Equal Employment Opportunity Commission (EEOC), issued guidance for employers for at-risk employees. The guidance provides that if an employee does not request an accommodation for his or her medical condition upon returning to work, “the ADA does not mandate that the employer take action.” However, an employer cannot remove an employee from the workplace based on knowledge of the underlying medical conditions. The ADA expressly precludes an employer from excluding an employee from the workplace, or taking any other adverse action, based solely upon the employee's known underlying medical condition, unless the employer determines the condition poses a “direct threat” to the employee's health “that cannot be eliminated or reduced by reasonable accommodation.” The “direct threat” is an affirmative defense under the ADA and, as the EEOC cautions, it is a high standard to meet.

Once an employee has self-identified as having an underlying medical condition, and we caution employers from acting on any perceived condition absent the employee's request for accommodation, the employer must perform a “direct threat analysis” to determine if an at-risk employee's health would be endangered upon returning to work. The analysis must include an “individualized assessment based on a reasonable medical judgment” regarding the employee's underlying condition and whether a reasonable accommodation can mitigate risk to the employee. For an at-risk employee returning to work amid COVID-19, a direct threat means “significant risk of substantial harm” to the employee's own health from exposure to others. In conducting this multi-step analysis, an employer should “consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the

potential harm." Where the employee's underlying medical condition is not obvious or already known, an employer may ask for additional information or request medical documentation from the employee's medical provider to determine whether the employee's medical condition necessitates an accommodation, either the one he or she requested or any other.

An employer can consider additional factors when conducting a direct threat analysis: (1) the prominence of COVID-19 infection in the geographical area; (2) the nature of the employee's essential job duties; (3) frequency of exposure to others in performing those duties; and (4) how well the employee's underlying health condition is managed.

Even where an employer determines a direct threat to an employee exists, it may not exclude the individual from the workplace or take any other adverse action against the employee unless it determines no reasonable accommodations can be offered to the employee that do not pose an undue hardship on the business.

We recommend employers engage in the interactive process with an employee with a known underlying medical condition in performing its individualized assessment of the risk posed to the employee for COVID-19 exposure. The EEOC advises that employers may implement reasonable accommodations in the workplace such as erecting physical barriers or moving the employee's work station, providing personal protective equipment, modifications to work schedules, telecommuting, or eliminating or reducing marginal job duties, to limit exposure to the employee.