



Employment Law Alert

Legal developments affecting human resource management

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The EEOC's new guidance on pandemic preparedness in the workplace and the Americans with Disabilities Act

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The federal Equal Employment Opportunity Commission (“EEOC”) has issued a technical assistance document to help employers prepare for a potential H1N1 pandemic in a manner that is consistent with the Americans with Disabilities Act (“ADA”). This document, entitled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” discusses particular areas under the ADA that may be implicated by employer concerns about employee exposure to H1N1 including: (1) disability-related inquiries and medical examinations; and (2) “direct threat” assessments and the duty of reasonable accommodation.

1. Disability-related inquiries and medical examinations

The EEOC guidance makes clear that, before an influenza pandemic occurs, an employer may *not* ask an employee if he or she has a health condition (e.g., a compromised immune system) that could make him or her more vulnerable to influenza. Such a question is likely to disclose the existence of a disability and is forbidden, absent objective evidence that pandemic symptoms will cause a direct threat. Before a pandemic occurs, the EEOC states there is no such evidence.

Of course, employers must be able to plan for the continuation of operations in the event of a pandemic. The EEOC guidance provides that employers *may* ask employees to identify whether they are likely to be unavailable for work in the event of a pandemic. A question along these lines is deemed to be *not* disability-related. The EEOC explains: “An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications).” The EEOC has included in its guidance an “ADA-compliant,” pre-pandemic survey sample for employers to assist in this regard. This survey includes, among non-medical inquiries, an inquiry that asks if an employee is in a “high risk” category for complications from a pandemic influenza virus, without specifying which of the enumerated list of such categories an employee falls.

As for medical examinations, an employer *may* require a post-offer medical examination of new, entering employees if all entering employees in the same job category are required to undergo the medical examination. Information obtained regarding the employee’s medical history and condition

must be kept in a medical file separate from the employee's personnel file. The examinations may be of limited utility, however, because an employer may not rescind a job offer because a post-offer medical examination reveals that an applicant is particularly susceptible to influenza. The only exception to this general rule is if the applicant would pose a direct threat within the meaning of the ADA.

2. Direct threat assessment and the duty to provide reasonable accommodation

A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."¹ In the context of pandemic influenza, the EEOC guidance states that

[a] finding of "direct threat" must be based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available evidence such as objective information from the CDC or state or local health authorities. The finding must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, after considering, among other things, the imminence of the risk; the severity of the harm; and the availability of reasonable accommodations to reduce the risk. Before concluding that an individual poses a direct threat, the employer must determine whether a reasonable accommodation could reduce the risk below the direct threat level.

The EEOC guidance expressly relies on the expertise and judgment of the Centers for Disease Control ("CDC"), the United States Department of Health and Human Services ("HHS"), and the World Health Organization ("WHO") with respect to the medical knowledge and recommendations concerning the pandemic. The EEOC also anticipates the fluid nature of this information, and advises employers "to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information." Given this directive, it would be prudent for an employer to consult with counsel before concluding that an applicant or employee poses a "direct threat" in the context of a pandemic.

3. Other guidance

Among the other tips contained in the EEOC guidance:

- During an influenza pandemic, an employer **may** send employees home if they display flu-like symptoms.
- Employers **may** ask employees if they are experiencing flu-like symptoms, such as fever or chills *and* a cough or sore throat. This information must be maintained as a confidential employee medical record.
- Measuring an employee's body temperature will generally be considered to be a medical examination.
- During a pandemic, an employer **may not** ask an employee who does not have flu-like symptoms to disclose whether he or she has a medical condition that could make them vulnerable to influenza complications. Nevertheless, an employer should encourage

¹ 29 C.F.R. § 1630.2(f).

employees with flu-like symptoms to stay at home, which will benefit those employees as well as those with vulnerable immune systems.

- An employer **may** encourage employees to work from home as an infection-control strategy.
- The EEOC recommends that employers *encourage* rather than *require* employees to get an influenza vaccine. A vaccine requirement may implicate the duty to reasonably accommodate an employee—both as a disability and in the case of a sincere religious belief (under Title VII of the federal Civil Rights Act of 1964).
- A pandemic does **not** excuse an employer’s duty to provide reasonable accommodations to employees with known disabilities that are unrelated to the pandemic. The undue hardship and direct threat exceptions to this duty, however, also continue to apply.
- An employer **may** ask an employee why he or she has been absent from work, even if the employer suspects the absence was for a medical reason.
- An employer **may** ask an employee about exposure to pandemic influenza after an employee returns from travel because such an inquiry is **not** disability-related.
- During a pandemic, an employer **may** require employees to wear PPE (personal protective equipment) designed to reduce the transmission of pandemic infection, but must still provide reasonable accommodation as needed, absent undue hardship. Note: although not mentioned by the EEOC, an employer would still have to comply with all applicable Fed/ OSHA or state-OSHA standards governing PPE.
- An employer **may** require an employee who has been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work. The EEOC notes that such an inquiry is either considered not disability-related or, in the event of a severe pandemic, considered a lawful disability-related inquiry

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The EEOC guidance serves as a reminder of an employer’s duties under the ADA, but does not purport to answer every question employers may have about how their employment policies may be impacted by H1N1. Moreover, although it may be relied upon by state and local officials, the EEOC’s guidance does not dictate how these officials will interpret state and local anti-discrimination laws and ordinances. These rules may be more restrictive than the ADA on an employer’s ability to prepare for, and respond to, H1N1 in the workplace.

At a minimum, we recommend that employers now review their current practices and policies to make certain they are compliant with this new EEOC guidance. We also continue to recommend that employers develop written communicable illness response programs addressing the needs of their specific workplaces. Please see the following links to our previous H1N1 alerts:

- http://www.nixonpeabody.com/publications_detail3.asp?ID=2974
- http://www.nixonpeabody.com/publications_detail3.asp?ID=2903
- http://www.nixonpeabody.com/publications_detail3.asp?ID=2892
- http://www.nixonpeabody.com/publications_detail3.asp?ID=2707

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