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PH COVID-19 Client Alert Series: EEOC Webinar Provides Guidance for Employers

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On Friday, March 27th, the Equal Employment Opportunity Commission shared a webinar offering additional guidance for employers with respect to the application of the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act, the Pregnancy Discrimination Act, and the Genetic Information Nondiscrimination Act ("GINA"), in light of the COVID-19 pandemic. We summarize below the highlights from that webinar, which is available here.

I. Permissible COVID-19 Inquiries of Employees Reporting to Work

- Employers may institute a policy of taking *all* employees' temperatures before they report to work and asking if they have been diagnosed with or have symptoms of COVID-19. However, in order to take the temperature of or question only *select* employees, the employer would need a reasonable belief that these employees might have COVID-19, based on objective evidence. The EEOC noted that exhibiting a persistent hacking cough would be sufficient, but an employee acting distracted would not.

- Employers also may ask whether an employee has had contact with anyone with symptoms or a diagnosis of COVID-19, but advised against limiting such a question to the status of an employee's family members, suggesting this inquiry could run afoul of GINA.

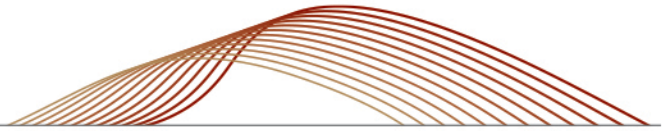
- If an employee informs their employer that they have been diagnosed with COVID-19 or are exhibiting symptoms, the employer may exclude that employee from the workplace. Employers may also exclude from the workplace those who refuse to answer questions about their symptoms or diagnosis.

- Not surprisingly, if employees are working remotely, these types of questions are impermissible.

II. Confidentiality and Disclosure of Diagnosis to Co-Workers

- The Commission stressed that employers should make every effort to limit the number of individuals who are aware of a diagnosed employee's identity, and those informed should be specifically instructed to maintain the confidentiality of such information.

- After learning of an employee's diagnosis, an employer may ask the diagnosed employee to identify co-workers with whom they had contact. The employer may notify those individuals



that they have had contact with a diagnosed individual, without disclosing the diagnosed employee's name. An employer may, however, disclose the identity of a diagnosed individual to public health authorities.

- Even when a co-worker deduces who has been diagnosed, an employer is still prohibited from confirming or revealing the employee's identity.

- If an employee is working remotely because they are symptomatic of or have been diagnosed with COVID-19, the EEOC instructed that their employer may disclose to others that the individual is working remotely, but should not disclose why.

- The ADA requires that an employee's medical information be stored separately from regular personnel files. If a manager can continue to follow their normal policies for storing this information while working remotely, they should do so. Otherwise, the manager should safeguard this information to the greatest extent possible until the information can be properly stored, and ensure it is not stored where others could have access.

III. At-Risk Individuals and Reasonable Accommodations

The EEOC also addressed questions about employees who are at higher risk from COVID-19 due to their age, pregnancy, or disability, and possible accommodations.

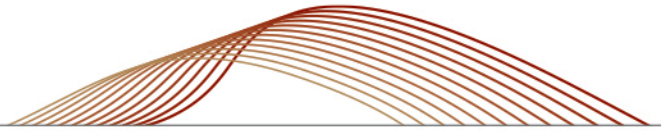
- Employees aged 65 or older may not be preemptively excluded from the office solely because their age places them at higher risk of severe illness from COVID-19, as this would violate the ADEA. An employer is also not required to grant a request from an older worker to work remotely solely on the basis that they are at higher risk.

- The Commission noted that under federal law, pregnant workers must be treated the same as all other workers. Therefore an employer should not deny a pregnant worker a needed adjustment, such as remote work, if the employer provides that adjustment to other employees who are similar in their ability or inability to work.

- The EEOC noted on the webinar that it could not yet answer whether COVID-19 constituted a disability under the ADA, as much remains unknown about the virus. However, if an individual has another ADA disability that puts them at higher risk for severe illness from COVID-19, such as chronic lung disease or a serious heart condition, their remote work request should be treated like any other request for a reasonable accommodation, and so should not be denied unless it poses an undue hardship to the employer. However, the Commission noted that an employee only has rights to an accommodation for their own disability, and therefore an employer is not required to grant a request for remote work because an employee's family member has a disability which puts them at higher risk.

IV. Reasonable Accommodations to Employees Working from Home

- Employers' obligations to reasonably accommodate disabilities under the ADA continues even where employees are working from home, but the EEOC noted that the temporary nature of the remote work and current circumstances may affect the undue hardship analysis or make an accommodation unfeasible, including the unavailability of certain items or inability of the employer to conduct a needed assessment. Given the current circumstances, the Commission encouraged both employers and employees to be flexible during the reasonable accommodation process, and stated that, for federal agencies, COVID-19 constitutes an



extenuating circumstance that can justify exceeding normal timelines required when processing reasonable accommodation requests.

- The EEOC stated that an employer allowing an employee to work remotely during the pandemic does not entitle an individual to continue to receive such accommodation after the public health emergency has passed, if another form of reasonable accommodation is then available, or if the employer was excusing performance of an essential function of an employee's job during the pandemic. However, if an employer previously denied remote work as an accommodation due only to concerns that the employee could not remotely perform all essential functions of their job, but did so during the pandemic, this fact should be considered when assessing a request to continue this accommodation after the pandemic has passed.

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The EEOC's webinar provided a significant amount of useful guidance for employers. However, it is important to remember that this advice addresses only federal law—there are often additional considerations based on state and local law. Our team is available to assist.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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