



EEOC provides COVID-19 return to work guidance for high risk workers as Ohio governor urges they stay home

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On April 30, 2020, Ohio Governor DeWine announced the “Stay Safe Ohio Order.” Like many other states, Ohio’s new order allows more workplaces to resume operations but also urges individuals at a high risk of severe illness from COVID-19, “including elderly people and those who are sick,” to continue to shelter at home.

How should employers call employees back to work who, due to age or certain high-risk conditions, are also being urged to continue to stay home? As part of its [guidance on federal employment laws and the pandemic](#), the U.S. Equal Employment Opportunity Commission (EEOC) recently provided more direction for employers on this issue.

First, the EEOC clarified that, as in any scenario, it is the employee’s obligation to inform their employer of the need for an accommodation due to a medical condition. The employer must then engage in the interactive process to assess whether the employee has a disability under the Americans with Disabilities Act (ADA) and if that disability can be reasonably accommodated.

Second, although an employer can prohibit employees with COVID-19 symptoms from entering the workplace because they present a direct threat to coworkers, the analysis is different when dealing with a potential “direct threat to self.” The EEOC explained that even if an employer is concerned about an employee’s health, “the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at ‘higher risk for severe illness’ if he gets COVID-19.” Under the ADA, such action is not allowed unless the employee’s disability poses a ‘direct threat’ to his health that cannot be eliminated or reduced by reasonable accommodation.

The EEOC explained further that the direct threat assessment cannot be based solely on the condition being on the CDC's list. The determination must involve an individualized assessment based on "reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence." Employers are to weigh factors like the severity of the potential harm to the worker, the likelihood the employee might be exposed to COVID-19 and the potential impact of any protective measures the employer is taking to protect the workforce as a whole.

Even if an employer concludes that an employee's return to work would be a direct threat to their health because of COVID-19, the employer's obligation does not stop there. Employers must then determine if an accommodation could mitigate the risk. Some potential accommodations listed by the EEOC include leave, reassigning a worker to a different job that allows them to work in a role where they are less likely to contract COVID-19, and allowing the employee to telework, which is also encouraged by the Stay Safe Ohio Order.

Conclusions

The direct threat standard is tough to meet. Employers should proceed with great caution before taking any type of unilateral employment action against high risk employees out of concern of COVID-19. Instead, employers should focus on providing information to all employees regarding state and federal recommendations, including those concerning high risk individuals, as well as information regarding the safety measures that the employer is implementing, and allow individuals to self-identify and make a request for accommodation if necessary.

Balancing state recommendations for high risk individuals with an employer's legal duty to not discriminate based upon age or disability will require careful consideration on a case by case basis.

Authors
