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LEGAL ADVISORY

*Pandemic preparedness in the workplace and
the Americans with Disabilities Act*

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Pursuant to the Americans with Disabilities Act (“ADA”), it is illegal to discriminate against employees based on a disability. The agency tasked with providing guidance for the ADA, the Equal Employment Opportunity Commission (“EEOC”) recently published guidance for employers regarding the interplay between the ADA’s anti-discrimination laws and the coronavirus pandemic.

This legal advisory is provided to summarize the EEOC’s technical assistance document on Pandemic preparedness in the workplace and the Americans with Disabilities Act.

Question 1:

What are the general rules regarding inquiries into an employee’s health and disabilities?

Answer:

The ADA (1) prohibits employers from making certain inquiries into an employee’s disability, (2) requires employee’s medical information remain confidential, (3) prohibits an employer from discriminating against an employee on the basis of their disability, and (4) requires an employer to provide disabled employees with a reasonable accommodation if it is not an undue hardship on the employer. The Family and Medical Leave Act (“FMLA”) and the Massachusetts anti-discrimination law, M.G.L. c. 151B, provide overlapping protections, obligations, and rights to employers and employees.

Question 2:

Can an employer ask an employee if they suffer from Coronavirus?

Answer:

Likely yes, where the coronavirus pandemic is severe and suffering from the virus poses a substantial risk to other employees. The employer, however, must keep this information confidential. It is more advisable for employers to ask if employees suffer from the symptoms of Coronavirus rather than asking them whether they have the virus.

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Question 3:

Can an employer require employees have their temperature taken before coming into work?

Answer:

Yes. Although this would be considered a medical exam, the EEOC guidance indicates that taking an employee's temperature is permissible where the CDC has warned the public regarding the spread of the virus. This is further reinforced where Massachusetts has declared a state of emergency to stop the spread of Coronavirus. Employers must maintain conformity with their rules though, they cannot discriminate against certain employees when conducting medical exams. For example, an employer likely is prohibited from only taking the temperature of employees who have requested reasonable accommodations in the past, or from choosing and selecting without defined parameters who they want to test.

Question 4:

Can an employer require an employee stay at home if they have Coronavirus symptoms?

Answer:

Yes. The CDC recommends individuals experiencing coronavirus symptoms leave work. The ADA protections for employees do not prohibit an employer from taking this safety precaution.

Question 5:

Can an employer require an employee to take a fitness for duty exam before returning to work?

Answer:

Generally, yes. An employer can require a fitness for duty exam before permitting the employee to return to work. EEOC guidance warns though that given the potential strains placed on the medical community with the pandemic, an alternative to a fitness for duty exam should be considered.

Question 6:

Can an employer inquire into where an employee has travelled before permitting them to come to work?

Answer:

Yes, they can. This is not a disability-related inquiry, but a safety precaution. Where Massachusetts has declared a state of emergency and prohibited gathering of 25 or more people, and where the federal government has advised against international travel, it would be permissible for an employer to ask an employee returning to work if they have travelled internationally or to a large gathering of people recently.

Question 7:

Can an employer require employees to work from home or wear personal protective equipment at work to prevent the potential spread of Coronavirus?

Answer:

Yes. An employer can take safety precautions without interfering with the ADA.

Question 8:

If a Coronavirus vaccine is developed, can an employer require all employees be vaccinated?

Answer:

No. An employer cannot require an employee be vaccinated if they have a sincerely held religious belief or observance that prohibits them from receiving such vaccination. An employer may also be prohibited from requiring an employee be vaccinated if they have a pre-existing medical condition that would place them at greater risk of harm if they receive the vaccination. EEOC guidance recommends employers encourage vaccination rather than require it.

Question 9:

Can an employer take a medical exam of a potential hire after offering them the position but before they begin work?

Answer:

Yes. An employer can take a medical exam of an employee, including but not limited to testing for Coronavirus, post-hire but pre-employment. This does not violate the ADA.