

EEOC's Recent COVID-19 Guidance Clarifications Underscore Legal Perils of Barring At-Risk Individuals With Disabilities From Returning to Work

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On May 7, 2020, the EEOC published revisions to its COVID-19 guidance explaining the agency's position regarding when, if ever, an employer may prevent an individual who it believes is or may be at higher risk for severe illness as a result of COVID-19 infection from returning to work.

The new content seeks to clarify earlier guidance the EEOC published on May 5, which it believes was misinterpreted by some as allowing employers more leeway to bar at-risk workers from the workplace during the pendency of the COVID-19 pandemic than the law actually provides.

The May 7 guidance, presented in question-and-answer format, **makes abundantly clear that the Americans with Disabilities Act (ADA) prohibits an employer from barring an individual from returning to work *on the basis of his or her disability***, except under very narrow and fact-specific circumstances.

Specifically, the guidance explains that refusing to return an individual to work due to a disability that places him or her at higher risk of COVID-19-related complications is only justified on "**direct threat**" grounds, in other words, where returning the employee would pose a substantial risk of significant

harm to his or her own safety *that cannot be significantly reduced or eliminated by workplace reasonable accommodations.*

“Direct threat” is a well-established statutory defense to liability for disability discrimination, but it is a narrow one that is very difficult to establish. In addition — and importantly — the direct threat defense is not available unless and until the employer has determined that no reasonable accommodation exists that would eliminate, or significantly reduce, the threat posed.

In other words, you cannot get to the direct threat analysis until you’ve examined and ruled out the availability of any reasonable accommodations that would resolve the issues. For tips on the ADA’s reasonable accommodation interactive process, we encourage you to revisit our recent publication, [“Using the EEOC’s ‘Interactive Process’ Framework to Address COVID-19 Reasonable Accommodation Requests.”](#)

The question the EEOC poses is:

The CDC identifies a number of medical conditions that might place individuals at **“higher risk for severe illness”** if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation?

The EEOC’s answer, in a nutshell, clarifies the following:

1. An employer’s obligation to provide reasonable accommodations is triggered only when an employee asks for one. In other words, an employer generally is under no obligation to provide a reasonable accommodation in the absence of an employee request for an accommodation.
2. The ADA does not allow an employer to bar an employee from the workplace — “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.”
3. The direct threat test is tough to meet. It requires an individualized assessment of present (not future, speculative, or remote) risk, considering its duration, imminence, and the likelihood of substantial harm. According to the EEOC:

A direct threat assessment cannot be based solely on the condition being on the CDC’s list; the determination must be an individualized assessment based on a 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. ... Analysis of these factors will likely include considerations based on the

severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

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