

US COVID-19: EEO REMINDERS TO INCLUDE IN RETURN TO WORK COMMUNICATIONS

Jun 23, 2020

As employers prepare their “Return To Work” plans, clear communications to employees about protocols and expectations will be critically important. Recent updates to the federal Equal Employment Opportunity Commission (EEOC) COVID-19 publication, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEOC Laws,” discuss “reminders” that employers should consider providing to employees on various EEO-related “Return To Work” topics.

Anti-Harassment Reminders

Near the beginning of the COVID-19 outbreak in the U.S., as reports of harassing conduct towards Asian individuals increased, the EEOC was quick to remind employers that they could reduce the chance of harassment by explicitly communicating to the workforce that fear of the pandemic “should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.” (E.1.)

The EEOC reiterated that guidance in its recent updates, noting that workforce reminders should:

- Note Title VII’s prohibitions on harassment;
- Remind employees that harassment will not be tolerated;
- Encourage anyone who experiences or witnesses workplace harassment to report it to management; and
- Remind employee that harassment can result in disciplinary action up to and including termination.

(E.3.) The EEOC further emphasized that managers in particular should be reminded of their roles in watching for, stopping, and reporting any harassment or other discrimination, and that managers should specifically “be alert to demeaning, derogatory, or hostile remarks directed to employees who

are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.” (E.3.)

Accommodation Reminders – Disability, Age, Childcare Responsibilities, Pregnancy, Religion

Certain individuals may have specific concerns regarding returning to the workplace that could implicate protected classes under employment laws such as Title VII, the ADA, and the ADEA, such as medical concerns related to being in a high risk category or religious concerns about screening protocols. Recognizing this, the EEOC encourages employers in its recent guidance to proactively address the concept of accommodation in their return to work communications, even if specific return to work dates are not yet known. The EEOC suggests that employers:

- Inform **all** employees about who to contact – if they wish – to request an accommodation **for a disability** that they may need upon return to the workplace. (G.6.)
 - Importantly, employers are permitted to include in such notice a list of the medical conditions identified by the CDC that may place people at higher risk of serious illness if they contract COVID-19, along with an indication of their willingness to consider on a case-by-case basis any requests from employees who have these or other medical conditions. (G.6.)
 - If employees request alternative screening methods due to a medical condition, employers may – but are not required to – request information/documentation to establish that the condition is a disability, what specific limitations require a disability, and the need for an accommodation. (G.7.)
- Inform **all** employees of the employer’s willingness to consider requests for accommodation or flexibilities for various reasons on an individualized basis. Because such requests may be based on considerations other than disability – for example, employees who have concerns **based on age, religion, childcare responsibilities, or pregnancy** – the EEOC suggests that employers specify if the appropriate contact person differs depending on the reason for the request. (G.6.)
 - Importantly, while the ADEA does not require accommodation for older workers due to age, the EEOC has indicated that employers may provide flexibility to workers age 65 and older, even if this results in younger workers ages 40-64 being treated less favorably in comparison. (H.1.)
 - That said, employers must be careful that, when providing “flexibilities” to employees, they are not treating employees differently based on sex or other EEO-protected characteristics. For example, male employees cannot be treated less favorably than female employees with

respect to flexibility based on childcare responsibilities based on gender-related assumptions about caretaking responsibilities. (I.1.)

- Regarding pregnancy, employers should note that: (a) employees may not be singled out for involuntary leave, layoff or furlough based on pregnancy; (b) while pregnancy itself is not a disability, pregnancy-related medical conditions may be disabilities and require consideration of a request for accommodation under the ADA; and (c) under Title VII, pregnant employees may be entitled to job modifications (e.g., telework; leave) to the extent provided for other employees who are similar in the ability or inability to work. (J.1. and J.2.)
- Ensure that supervisors, managers, and human resources personnel know how to recognize and handle requests for accommodation. (J.2.)

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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MEET THE TEAM



Christy E. Phanthavong

Chicago

christy.phanthavong@bclplaw.com

[+1 312 602 5185](tel:+13126025185)