CLIENT ALERT: EEOC Issues Additional Guidance Addressing Return to Work under COVID-19

On June 11, 2020, the Equal Employment Opportunity Commission ("EEOC") expanded on its guidance about the COVID-19 crisis related to obligations under Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and other equal employment opportunity laws. The June 11 update to the Technical Assistance Questions and Answers builds upon prior updates to this same document and provides further information on the EEOC's interpretation of discrimination law. See MBJ's prior client alerts dated March 20, 2020 and May 5, 2020 for our analysis of prior updates to this EEOC publication.

The EEOC stated that its guidance seeks to answer "common employer questions about what to do after a pandemic has been declared." While most of the information reiterates commonly known principles, the June 11 update advises the following:

- Employees are not entitled to an accommodation under the ADA to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. The EEOC notes by way of example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. The ADA prohibits discrimination based on association with an individual with a disability, but that protection is limited to disparate treatment or harassment. (D.13).
- Employers remain obligated to ensure that the workplace is free from unlawful harassment. This obligation includes ensuring that employees recognize and report harassment, including harassment related to COVID-19, such as demeaning, derogatory, or hostile remarks directed to employees who are or perceived to be of Asian national origin about the coronavirus or its origins. The EEOC suggests that employers consider sending a reminder to the entire workforce reminding it of the prohibition on unlawful harassment and inviting employees to report instances of harassment to management. Any harassment, including

allegations of harassment by email, must be investigated and addressed. (E.3 and E.4).

- As a best practice, the EEOC recommends that in advance of employees returning to the workplace, an employer invite all employees to request flexibility in work arrangements. This, the EEOC counsels, would allow the employer and employee to begin the interactive dialog, should a disabled employee seek an accommodation. An employer "may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions." Employers are reminded to be attentive to the different federal employment nondiscrimination laws that may apply for accommodations, including accommodations due to a medical condition, religious belief, or pregnancy. (G.6).
- If an employee requests an alternative method of screening when entering the workplace because of the employee's medical condition or religious belief, the employer must treat that as a request for a reasonable accommodation under the ADA or Title VII, as applicable. (G.7).
- Even though the CDC has explained that individuals over age 65 are at higher risk for a severe case of COVID-19, the Age Discrimination in Employment Act ("ADEA") prohibits employers from excluding older individuals from the workplace based on age (over 40), "even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19." Older employees are not entitled to a reasonable accommodation due to their age (although they may have a medical condition which would then entitle them to a reasonable accommodation for a disability). (H.1).
- Employers may not treat female employees more favorably than male employees (or vice versa) because of a gender-based assumption about who may have child-care responsibilities. (I.1).
- Employers may not exclude pregnant employees from the workplace involuntarily, even if motivated by a desire to protect the pregnant employee. If an employee requests an accommodation due to her pregnancy, the employer may be required to modify the job as an accommodation either because of the pregnancy or because of an underlying health condition that constitutes a disability. (J.1 and J.2).

In addition to the EEOC's guidance, employers are reminded that state law

also governs the employment relationship during the pandemic. For example, through the Pregnant Workers Fairness Act, Massachusetts requires employers to provide certain accommodations and protections to pregnant employees beyond that which federal law requires.

The forgoing summarizes the guidance as of the date of this publication. Employers should be mindful that these issues remain fluid and should ensure that decisions are made based on the most up-to-date information available. Employers with questions about their equal employment opportunity responsibilities should consult with their MBJ attorney.

Jeffrey S. Siegel is a partner with Morgan, Brown & Joy, LLP, and may be reached at jsiegel@morganbrown.com or (617) 523-6666. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on June 15, 2020.