

## **CLIENT ALERT - CORONAVIRUS (COVID 19) IN THE WORKPLACE - GUIDANCE FROM CDC, EEOC and NY ATTORNEY GENERAL**

Dear Clients and Friends:

As the Covid 19 crisis continues, many employers with essential workers are faced with how to best protect their workforce from the virus and their decisions from legal challenges. New guidance from the Centers for Disease Control (CDC), Equal Employment Opportunity Commission (EEOC) and New York Attorney General may assist.

### **Reasonable Accommodation—EEOC and NY Attorney General**

#### **A. Requests for Accommodation by Essential Workers**

Many employers have asked whether they must continue to provide reasonable accommodations for employees, and if so, under what circumstances. This week, the EEOC reaffirmed that there are no blanket exceptions to the reasonable accommodation process during the crisis.

The only exception to the continued obligation to provide accommodations is if the accommodation requested poses an 'undue hardship,' i.e., if it 'results in a significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business.'

This means that for employees who can demonstrate a disability (including a pre-existing medical condition such as asthma or autoimmune disease) who have asked for an accommodation such as working at home or an unpaid leave of absence, the employer must consider whether it can grant such an accommodation given the needs of the job, the ability to do the job from home, the cost of allowing the employee to do so, and the disruption to the employer's operations. It is a fact intensive inquiry and blanket rules are not likely to withstand scrutiny.

The EEOC has provided additional guidance to employers on the interactive process as follows:

- Employees with a disability who may be at greater risk of severe illness if they contract COVID-19 may request a reasonable accommodation. Upon receiving such a request, employers should focus on implementing an interactive process that is as "flexible and creative" as possible.
- Employers may verify that an employee has a disability and needs the requested accommodation. However, employers must understand that health care providers may have difficulty responding quickly and be open to alternative ways to substantiate the request, such as health insurance or prescription records.
- Due to the emergent nature of COVID-19, employers are encouraged to provide requested accommodations on a temporary basis while they are waiting for more information or discussing the request with the employee.

The NYS Attorney General's office has included the following guidance in their Employment Law Guide for Covid-19:

Under federal, state, and local law, employers must provide a reasonable accommodation for employees if, as a result of a long- or short-term disability, they need an accommodation to perform their jobs. Reasonable accommodations can include telecommuting, staggering your schedule, or taking leave. Short-term disabilities protected under the anti-discrimination laws includes severe but temporary illnesses.

#### **Contact**

80 Exchange Street  
Binghamton, NY 13901  
Phone: (607) 723-5341  
Fax: (607) 723-6605  
Email: [tconlon@hhk.com](mailto:tconlon@hhk.com)  
[jfish@hhk.com](mailto:jfish@hhk.com)  
[dlanouette@hhk.com](mailto:dlanouette@hhk.com)

**B. Family Member Illness or Risk Factors Not a Reason for Reasonable Accommodation**

There are other leave laws applicable to family member care that may apply for essential workers (including Family and Medical Leave Act leave, NYS Paid Family Leave, and for non-healthcare workers, federal leave). The EEOC has stated, however, that family member risk factors or illness is not a reason for a reasonable accommodation under the ADA.

Because employees are only entitled to reasonable accommodations for their own disabilities, employers are not obligated to grant reasonable accommodations to employees who have a family member at greater risk of severe illness due to a disability, provided the employer implements its own policies equally.

**C. Mental Health Accommodation**

The EEOC guidance makes suggestions for handling requests for accommodation due to mental health issues. This area is particularly fraught, and employers would do well to review the types of questions the EEOC finds acceptable and those it finds unacceptable prior to making any inquiry.

Neither the EEOC nor New York State have suggested that generalized fear about Coronavirus is sufficient to be granted an accommodation from employment (such as a leave of absence). It remains to be seen how NYS Department of Labor Unemployment Insurance will treat employees who quit because of such generalized fear.

**D. After the Crisis**

Many employers fear the effect of granting accommodation on the long term business enterprise. The EEOC has clarified that “[e]mployers who implement teleworking to slow or stop COVID-19 are not required to automatically grant teleworking as a reasonable accommodation to employees with a disability who wish to continue this arrangement after the crisis passes. This is particularly true where the temporary teleworking arrangement excused an employee from performing all of the essential functions of his or her job.”

**Age and Pregnancy—No Blanket Exclusion from the Workplace**

Employers have expressed concern over workers who are over 70 years of age in the workplace and pregnant employees who are working during the crisis. The EEOC has refused to allow employers to exclude such employees from the workplace.

Employers may not exclude older or pregnant employees who may be at a higher risk of complications if they contract COVID-19 from the workplace. Such conduct violates the ADEA, Title VII and other applicable federal antidiscrimination laws. Conversely, employers are not obligated to grant requests to telework from employees simply on the basis of their age or pregnancy.

The EEOC does recognize that people over the age of 70 or those who are pregnant may have other risk factors which would entitle them to a reasonable accommodation.

For New York employers, there is additional concern over the Governor’s plan (NY on Pause) which includes having people over 70 stay out of the public. It is not clear whether an employer who relies on this guidance could use it as a defense in an age discrimination case.

**CDC Guidance on Critical Workers and Exposure to Covid 19**

In light of the severe shortage of critical healthcare workers, the CDC has also updated its interim guidance for critical infrastructure employers. The CDC now advises that ‘critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.’

The EEOC suggests the additional precautions for such employees should include pre-screening, regular monitoring, wear a mask, maintain social distancing of six (6) feet as much as possible, and disinfect and clean workspaces regularly.

## **Resources**

**The EEOC updated guidance is available here:**

[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

**The New York State Attorney General's FAQ for Employers (which includes brief answers on leave questions beyond reasonable accommodation) is available here:**

<https://ag.ny.gov/sites/default/files/coronavirus-employment-faq.pdf>.

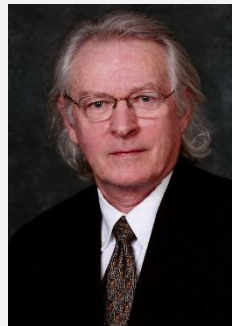
**The CDC updated guidance for critical infrastructure workers is available here:**

<https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>.

As always, we remain available to answer your questions and assist you with the difficult decisions you are making during this process.



Thomas A. Conlon  
Partner  
80 Exchange Street  
Binghamton, NY 13901  
Phone: (607) 231-6744  
Email: [tconlon@hhk.com](mailto:tconlon@hhk.com)



John C. Fish  
Partner  
80 Exchange Street  
Binghamton, NY 13901  
Phone: (607) 231-6712  
Email: [jfish@hhk.com](mailto:jfish@hhk.com)



Dawn J. Lanouette  
Partner  
80 Exchange Street  
Binghamton, NY 13901  
Phone: (607) 231-6917  
Email: [dlanouette@hhk.com](mailto:dlanouette@hhk.com)

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