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COVID-19 Pandemic Update from the EEOC: ADA Violation if Employers Require Antibody Testing Before Employees Re-enter the Workplace and ADEA Violation if Employers Exclude Individuals Age 65 or Older from the Workplace

This month, the EEOC has updated its Technical Assistance publication addressing questions arising under the ADA and the ADEA related to the COVID-19 pandemic. Specifically, the EEOC explains certain return-to-work actions by employers are discriminatory.

Antibody Testing and the ADA

The EEOC update explains that in light of current CDC Interim Guidelines, the Americans with Disabilities Act (ADA) does not allow employers to require antibody testing before allowing employees to re-enter the workplace. The CDC issued guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace." The EEOC has now explained under the ADA an employer may not require antibody testing before permitting current employees to return to work because an antibody test "at this time does not meet the ADA's 'job related and consistent with business necessity' standard for medical examinations or inquiries for current employees."

The EEOC makes a distinction between antibody testing and viral testing for an active case of COVID-19. In April 2020, the EEOC stated that an employer may choose to administer COVID-19 viral testing to employees before they enter the workplace to determine if they have the virus because the ADA requires that any mandatory medical test of an employee's job be "job related and consistent with business necessity." An antibody test is different from a viral test that determines if a person has an active case of COVID-19. Antibody tests are blood tests that look for antibodies that can show if a person had a past infection. Therefore, under the ADA, COVID-19 viral tests are permitted, while antibody tests are not for employees re-entering the workplace.

Employees 65 Years of Age and Older and the ADEA

The EEOC also updated its Technical Assistance publication regarding the Age Discrimination in Employment Act (ADEA) and the COVID-19 pandemic. Specifically, the EEOC states that the ADEA prohibits an employer from involuntarily excluding an individual from the workplace based on him or her being 65 years of age or older, even if the employer acts for "benevolent" reasons such as protecting the employee due to higher risk of severe illness from COVID-19. The CDC has explained individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus. However, the EEOC points out that the ADEA does not prohibit employers from providing flexibility to workers age 65+ even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. Also, the EEOC makes it clear that while the ADEA does not include a right to reasonable accommodation for older workers due to age, employees age 65 or older may have medical conditions that provide them with protections under the ADA.

Comment: When determining when and how to return employees to the physical workplace, employers should be mindful of not only CDC and state and local guidelines, but must make sure the actions do not run afoul of the federal, state and local equal employment opportunity laws. Return-to-Work decisions are complex and require thorough planning. Our Employment Law Group can assist businesses with developing effective Return-To-Work plans as they navigate these unique issues.